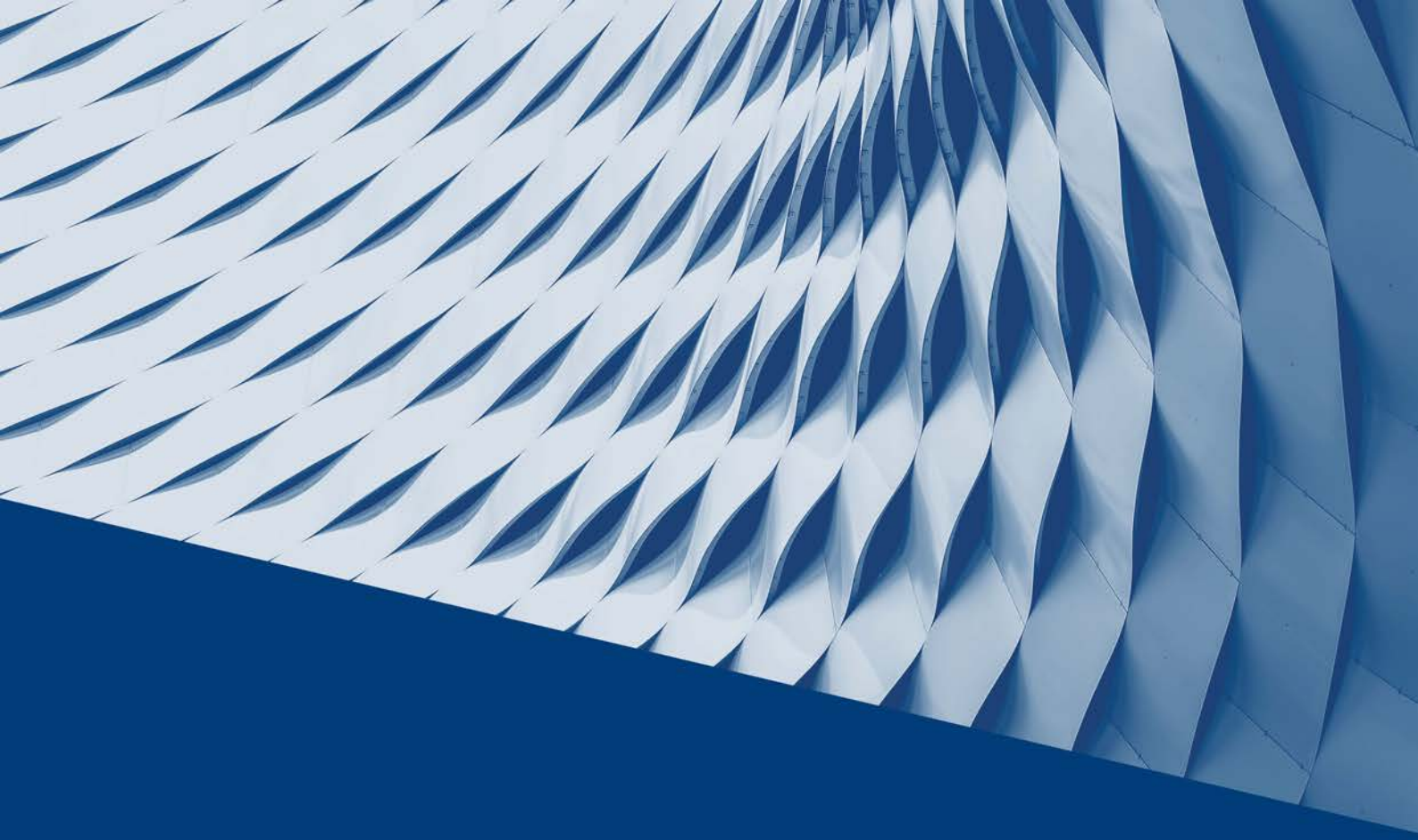

Model Terms for Enterprise Agreements & Copied State Instruments

Submission by the Australian Council of Trade Unions to the Fair Work Commission (AG2024/3500, AG2024/3501, AG2024/3502, AG2024/3503)
– 1 November 2024

ACTU Submission, 1 November 2024
ACTU D. No 74 /2024

ACTU
australian council of trade unions

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ACTU

About the ACTU

Since its formation in 1927, the ACTU has been the peak trade union body in Australia. It has played the leading role in advocating for, and winning the improvement of working conditions, including on almost every Commonwealth legislative measure concerning employment conditions and trade union regulation. The ACTU has also appeared regularly before the Fair Work Commission and its statutory predecessors, in numerous high-profile test cases, as well as annual national minimum and award wage reviews.

The ACTU is Australia's sole peak body of trade unions, consisting of affiliated unions and state and regional trades and labour councils. There are currently 36 ACTU affiliates who together have over 1.7 million members who are engaged across a broad spectrum of industries and occupations in the public and private sector. The ACTU has consulted with its affiliates in the preparation of the proposals contained in these submissions.

Change to Model Terms and Consultation

The *Fair Work Legislation Amendment (Closing Loopholes No. 2) Act 2024* ("**the Amendment Act**") has amended the *Fair Work Act 2009* ("**the FW Act**") to require the Commission to make new model terms for enterprise agreements and a new model disputes resolution term for copied State instrument. In particular, the legislation requires the Commission to make the following new model terms:

(a) a flexibility term for enterprise agreements;

(b) a consultation term for enterprise agreements;

(c) a term about dealing with disputes for enterprise agreements; and

(d) a term for settling disputes about matters arising under a copied State instrument for a transferring employee

The model terms are currently prescribed in the *Fair Work Regulations 2009* ("*the FW Regulations*"). However, pursuant to Part 5 of Schedule 1 to the Amendment Act those terms will be replaced by the Commission's new model terms on 26 February 2025, or an earlier date fixed by proclamation.

The changes are significant in three ways. Firstly, they appointed a new decision maker to determine the content of the model terms. Secondly, they require that decision making to consult before making the decision. Thirdly, they provide specific legislative guidance with respect to the

content of the model terms. The intended approach is described in the Explanatory Memorandum to the *Fair Work Legislation Amendment (Closing Loopholes) Bill*:

> 70. *The amendments in Part 5 of Schedule 1 would be compatible with and promote the right to just and favourable working conditions of work and collective bargaining. The model terms act as a safety net ensuring that compliant terms dealing with consultation, flexibility and dispute resolution are included in all enterprise agreements, and a compliant term dealing with dispute settlement is included in copied State instruments. The model terms would not override terms agreed to between the parties to an agreement or instrument where the terms meet the requirements of the FW Act, minimising any concern that the model terms would limit the capacity of employees to determine just and favourable conditions.*
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> 71. *The amendments empowering the FWC to determine the model terms for enterprise agreements and copied State instruments require the FWC to consider 'best practice' workplace relations and whether all persons and bodies have had a reasonable opportunity to be heard and make submissions before making the determinations. It is intended that this would ensure the ongoing relevancy of the model terms as well as facilitating greater public consultation in the determination of the model terms.*
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> 72. *In mandating considerations of best practice workplace relations and public participation in the process of determining model terms, individuals are empowered to participate in the determination of up-to-date and relevant terms that may form part of the terms and conditions of their employment. In doing so, the amendments support the right to just and favourable conditions of work.*
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> ...
>
> 524. *Part 5 would require the FWC to determine model flexibility, consultation and dispute resolution terms for enterprise agreements, and the model dispute settlement term for copied State instruments. As Australia's independent workplace relations tribunal, with responsibility for setting and reviewing the equivalent clauses in the award safety net, it is appropriate that the FWC perform this function. The Bill prescribes the matters the FWC must take into account when determining each model term.*
>
> 525. *Part 5 would commence by Proclamation or the day after a 12-month period commencing on the day the Bill receives Royal Assent. A maximum period of 12 months would allow sufficient time to constitute a Full Bench (or Full Benches) to determine the model terms, hear and consider submissions made in relation to the model terms as would be required by Part 5, and make the determinations. It is intended that the FWC would undertake detailed consultation, including with (but not limited to) national peak councils, during this period.*
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> 526. *The FWC would have the power to vary its determinations. Responsibility for maintaining the currency of the model terms will be vested in the FWC and the ability to vary the terms in line with developments in workplace relations will ensure their ongoing relevancy.*

On 17 September 2024, the President issued a statement concerning how the Commission intended to conduct its determinative process with respect to the new model terms. The statement included a proposed timetable and invited comments on the timetable to be made by 23 September 2024. A copy of a background paper produced by staff of the Fair Work Commission titled "Background Paper: Model Terms for Enterprise Agreements" ("**the Background Paper**") was released on the same day.

On 26 September 2024, the President issued a further statement confirming the timetable. The timetable provides for submission to be made by 1 November 2024. This submission is made pursuant to that timetable.

A public consultation for interested parties is listed before a Full Bench on 3 December 2024.

Significance of Model Terms

Legal Significance

The legal significance of each of the model terms, and their context within the FW Act, is well described in the President's statement and accompanying Background Paper.

In short, the FW Act requires enterprise agreements to contain, amongst other things, a consultation term, a flexibility term and a dispute settlement term that meet certain pre-requisites. In the case of the Model Flexibility Term and the Model Consultation Term, if an enterprise agreement lodged with the Commission for approval does not contain a flexibility or consultation term that meet the relevant prerequisites of the FW Act, the respective Model Term is be taken to be a term of the enterprise agreement as part of the approval process[1].

The role of the Model Dispute Term is however, somewhat different. If an enterprise agreement does not contain a dispute settlement term that meets the prerequisites required by the FW Act, the Model Dispute Term is *not* taken to be a term of the enterprise agreement.[2] Aside from circumstances where an undertaking is given the Model Dispute Term can never be inserted in an enterprise agreement during the approval process without the support of the employees.

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[1] Sections.202 & 203 of the FW Act provide that an agreement must contain a flexibility term, the content of that term and that the model term will apply if an agreement doesn't contain a flexibility term. Section 205 of the FW Act provides effectively the same mechanism with respect to a consultation term.
[2] Under s.186 of the FW Act for the Commission to approve an agreement it must contain a dispute settlement term.

However, it is important context to the proceedings before the Commission to emphasise that *none* of the 3 Model Terms relating to enterprise agreements are mandatory in an absolute sense. Provided the parties negotiating an enterprise agreement produce terms that meet the prerequisites of the FW Act, the negotiated flexibility, consultation and dispute settlement terms agreed by those parties may (and very often do) differ in form and in substance to those contained in the Model Terms.

The role of the model term for settling disputes about matters arising under a copied State instrument for a transferring employee applies in a different legislative context. A "copied State instrument" is a notional instrument created in accordance with Part 6-3A of the FW Act where there is a transfer of business from a State public sector employer to a national system employer. A copied State instrument applies to each transferring employee and contains the terms and conditions of the previously applying State award or State employment agreement. Where the copied State instrument does not include a term that provides a procedure for settling disputes about matters arising under the instrument, then the instrument is taken to include the model term that is prescribed by the regulations for settling disputes about matters arising under a copied State instrument for a transferring employee.

Measurable Practical Significance

In terms of practical significance, there appears patchy data concerning the Model Terms. The Background Paper issued by the Commission nevertheless provides some useful statistical information concerning the use of the Flexibility and Dispute Settlement Terms.

In relation to the Model Flexibility Term, the Background Paper reports that Department of Employment and Workplace Relations ("**DEWR**") data appears to suggest that 12.7% of agreements contained the Model Flexibility Term as a result of it being incorporated at the time of approval and 33.6% of agreements contain "a form" of the Model Flexibility Term.

In relation to the Model Dispute Term, the DEWR data suggests that 10.7% of agreements contain the model term.

It appears that no DEWR data is available with respect to the Model Consultation Term nor the Model Dispute Term with respect to copied state instruments.

Matters to Be Considered In Determining New Model Terms

The matters the Commission must consider in determining the new Model Terms are contained in what will become the new ss. 202(5), 205(3), 737(1) and 768BK(1A) of the FW Act. Those matters were summarised in the President's statement as follows:

> [18] *New ss 202(6)(b), 205(4)(b), 737(2)(b) and 768BK(3) set out the matters the Commission must take into account in determining the model terms. These are:*
>
> - *whether the model term is broadly consistent with comparable terms in modern awards;*
> - *best practice workplace relations as determined by the Commission;*
> - *whether all persons and bodies have had a reasonable opportunity to be heard and make submissions to the Commission for consideration in determining the model term;*
> - *the object of the Act (see s 3);*
> - *for the model flexibility and consultation terms, the objects of Part 2-4 (see s 171);*
> - *for the model consultation term, whether the model term would, or would be likely to have, the effect referred to in ss 195A(1)(a), (b), (c) or (d) (objectionable emergency management terms);*
> - *for the model term for dealing with disputes and the model term for copied State instruments about dealing with disputes, the operation of ss 739(3), (4), (5) and (6) and ss 740(3) and (4); and*
> - *any other matters the Commission considers relevant.*
>
> *[19] The Commission must also ensure that:*
>
> - *the model flexibility term is consistent with s 202(1) (see s 202(6)(a));*
> - *the model consultation term is consistent with ss 205(1) and (1A) (see s 205(4)(a)); and*
> - *the model term for dealing with disputes is consistent with the requirements in s 186(6) (see s 737(2)(a)).*

The new sections 202(6)(b), 205(4)(b), 737(2)(b) and 768BK(3) will come into operation on 27 February 2025 and can be found in Part 5 of Schedule 1 to the Amending Act.

The Content and Background of the Current Model Terms

The current model terms can be found in the Schedules to the FW Regulations:

(a) the Model Flexibility Term in Schedule 2.2;

(b) the Model Consultation Term in Schedule 2.3;

(c) the Model Term for dealing with disputes for enterprise agreements in Schedule 6.1; and

(d) the Model Term for dealing with disputes about matters arising under copied state instruments in Schedule 6.1A.

Each of the Model Terms for enterprise agreements were originally introduced as part of the substantial changes made by the FW Act to the national workplace relations system that commenced on 1 July 2009.

The Model Term dealing with disputes about matters arising under copied State instruments was introduced later into the FW Regulations by the *Fair Work Legislation Amendment Regulation 2012 (No. 2)*.

A brief the history of each of the model terms, and how they have changed over time, is provided below.

The Model Flexibility Term

Upon coming into operation section 202 of the FW Act required that a Model Flexibility Term be prescribed by regulation.[3] The Explanatory Memorandum to the *Fair Work Bill 2009* explained that it was intended that the model term to be prescribed would "be based upon the model flexibility term developed by the AIRC for inclusion in modern awards".[4]

In accordance with s.202, the Model Flexibility Term was subsequently prescribed by the FW Regulations, with the accompanying Explanatory Statement confirming that, as had been foreshadowed in the Explanatory Memorandum to the Bill, the new model term was based on the Australian Industrial Relations Commission's modern award flexibility term.[5] The modern award flexibility term had been developed as part of the modern awards process triggered by request the received by the President of the Commission from the Minister for Employment and Workplace Relations in March 2008.

There have been no changes of any substance to the Model Flexibility Term it was first included in the *Fair Work Regulations 2009*.

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[3] Section 202 of the Fair Work Act 2009.
[4] Explanatory Memorandum to Fair Work Bill 2008 r.151.
[5] Explanatory Statement to the *Fair Work Regulations 2009* at paragraph 288.

The Model Consultation Term

Like the Model Flexibility Term, the new FW Act provided that a Model Consultation Term be prescribed by regulation. [6] The Explanatory Memorandum to the *Fair Work Bill 2009* also provided that the new Model Consultation Term was intended to be based on the consultation term developed by the AIRC for inclusion in modern awards.[7]

A Model Consultation Term was subsequently prescribed by the FW Regulations and the Explanatory Statement to those regulations confirmed that the term was based on the AIRC standard modern award consultation term.[8]

As the AIRC had observed when considering and subsequently making the standard modern award consultation term, the clause ultimately adopted was "in similar form to the provision introduced by the Commission more than 20 years ago" and reflects much of the substance and language of the TCR test cases. [9]

Since coming into operation, the Model Consultation Term introduced by the principal regulation has had only one *substantive* change. That change occurred in accordance with the *Fair Work Amendment Regulation 2013 (No.2)* and as a consequence of the amendments made to s.205 of the FW Act by the *Fair Work Amendment Act 2013*.

The *Fair Work Amendment Regulation 2013 (No. 2)* repealed the Model Consultation Term set out at Schedule 2.3 of the principal regulations and substituted a new Model Consultation Term into Schedule 2.3. The new Model Consultation Term introduced a process requiring an employer to consult about a change to their regular roster or ordinary hours of work. The *Fair Work Amendment Regulation 2013 (No. 2)* however, made no substantive change to that part of the Model Consultation Term dealing with major change, which continues broadly to reflect the TCR standards introduced into the award system approximately four decades ago.[10]

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[6] Section 205 of the Fair Work Act 2009.
[7] Explanatory Memorandum to Fair Work Bill 2008 at 878.
[8] Explanatory Statement to the *Fair Work Regulations 2009* at paragraph 297.
[9] See [2008] AIRCFB 717 at paragraph [18] and [2008] AIRCFB 1000 at paragraph [44]. TCR cases: *August 1984 TCR Decision* [1984] 8 IR 34 and *December 1984 TCR Decision* [1984] AIRC 133.

[10] See generally the Explanatory Statement to the *Fair Work Amendment Regulation (No. 2) 2013*, Select Legislative Instrument 2013 No. 139.

The Model Dispute Term

The first statutory model dispute process in the federal jurisdiction was introduced in the form of a "Model Dispute Resolution Process" as part of the substantial amendments to the *Workplace Relations Act 1996* brought about by the *Workplace Relations Amendment (Work Choices) Act* 2005. The introduction of the model dispute process accompanied the stripping of the general power of arbitration from the AIRC. The new model dispute process, which was contained in what became the new Part 13 of the *Workplace Relations Act 1996*, was incorporated into all federal awards, all notional agreements and all preserved State agreements, replacing any disputes procedures previously contained in those instruments.[11] The Model Dispute Resolution Process also applied, by default, to any new workplace agreement where the agreement did not contain a dispute resolution procedure.

Later, the *Fair Work Act 2009* abandoned the Model Dispute Resolution Process of the post-Workchoices *Workplace Relations Act 1996* however, maintained the use of a model dispute term albeit not imposed on any instrument or workplace agreement. The term was contained in Schedule 6.1 to the *Fair Work Regulations 2009*.

Unlike the Model Flexibility Term and the Model Consultation Term, the Model Dispute Term was not based upon a model term developed by the AIRC for inclusion in modern awards and did not apply by default (should an enterprise agreement fail to meet the requirements c s.186(6) of the FW Act).

The Model Dispute term has remained substantively the same since it came into operation in 2009.

The Model Term for Dealing with Disputes - Copied State Instruments

A model term for dealing with disputes about matters arising under copied State instruments was introduced into the *Fair Work Regulations 2009* by the *Fair Work Legislation Amendment Regulation 2012 (No. 2)*. The purpose and content of the term was described in the Explanatory Statement:

> *Section 768BK of the FW Act provides that if a copied State instrument does not include a term that provides a procedure for settling disputes about matters arising under the instrument, then the instrument is taken to include the model term that is prescribed by*

[11] A useful discussion of the changes is contained in Stewart A, "Work Choices in Overview: Big Bang or Slow Burn?"- [2006] ELRRev 3; (2006) 16(2) The Economic and Labour Relations Review 25.

> *the Fair Work Regulations 2009 (the Principal Regulations) for settling disputes. The Regulation amends the Principal Regulations to prescribe such a model term. The prescribed model term is similar to the existing model term for dealing with disputes for enterprise agreements under the FW Act. It contains detailed procedures for settling disputes that relate to a matter arising under the instrument, at first instance at the workplace and then allowing escalation to, FWA. FWA is able to mediate or conciliate, and if necessary, make a binding determination. The model term also deals with representation for employees and the requirement that work continue normally during the dispute (subject to health and safety matters).*[12]

The model has remained substantively the same since its inclusion in the *Fair Work Regulations 2009* in 2012.

Changes Proposed by the ACTU

The changes made by the *Fair Work Legislation Amendment (Closing Loopholes No. 2) Act 2024* require the Fair Work Commission to determine the Model Terms for enterprise agreements and copied state instruments for the first time. As indicated earlier in these submission, prior to that amendment, the legislation has previously provided relatively little specific guidance as to what matters the Minister should consider in promulgating regulations containing the model terms[13], save that the Explanatory Memorandum of the *Fair Work Bill 2009* indicated, in the case of the Model Flexibility Term and the Model Consultation Term, that the Model Terms prescribed in the regulations were intended to be based upon the flexibility term and the consultation term developed by the AIRC for inclusion in modern awards.

However, following the passing of the *Fair Work Legislation Amendment (Closing Loopholes No. 2) Act* 2024, the FW Act now provides a list of specific matters the Commission must take into account when formulating the model terms.

Whilst the criteria for the determining of the new model terms notably requires a consideration of whether the model terms are broadly consistent with comparable terms in modern awards, the ACTU respectfully submits that even in those instances where there may be broad consistency with comparable terms in the modern awards, the Fair Work Commission should not forego the opportunity to consider substantially reviewing the current terms if there are reasonable grounds to do so.

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[12] Explanatory Statement to the *Fair Work Legislation Amendment Regulation 2012 (No.2)* Select Legislative Instrument 2012 No. 322.

[13] See ss.202, 205 and 737.

As a previous Full Bench of the Commission observed in considering possible amendments to the modern award consultation term in 2013, the nature of the model terms in enterprise agreements differ markedly from comparable terms in awards:

> *[44] We are not persuaded that the prescribed model consultation term is relevant to our determination of the term to be inserted in modern awards to meet the requirements of the transitional provision, for two reasons.* ***First, there is a clear distinction between the context and purpose of the prescribed model consultation term and the task we are undertaking. The prescribed model consultation term is a default provision which is taken to be a term of an enterprise agreement if that agreement does not include a consultation term of the type required by s.205. The parties to enterprise agreements are free to agree on a different formulation of the consultation term, provided the term they agree upon complies with s.205. While ss.145A and 205 are expressed in the same terms (insofar as they deal with consultation about changes to regular rosters or ordinary hours of work), the context is different. Section 205 operates in the context of collective bargaining whereas s.145A is directed at modern awards which operate as part of a safety net of minimum terms and conditions underpinning collective bargaining (see ss.3, 134 and 193).*** *For the same reasons the Commonwealth's views to the form of a consultation clause to give effect to s.145A cannot be inferred from the form of the prescribed model consultation term. [emphasis added]*[14]

The ACTU respectfully submits that while the scheme of the Act is clearly that the model term for enterprise agreements should not undermine the "safety net" of the modern awards, where additional matters or mechanisms may be included in the Model Terms that would appear "best practice" or otherwise would further advance the objects of the Act in the context of contemporary workplace relations, it is appropriate that the Commission include such matters in the new Model Terms.

It is with this approach to the new legislative framework that the ACTU has developed the proposed changes to the model terms that are the focus of these submissions.

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[14] [2013] FWCFB 10165

Proposed Changes to the Model Flexibility Term

The ACTU proposes that the Fair Work Commission adopt a new Model Flexibility Term, that differs in a number of respects from the wording currently contained in the Model Flexibility Term contained in Schedule 2.2 of the FW Regulations.

The proposed changes are detailed on the pages that follow in "marked-up" form using the current term as a base. The ACTU's submissions in support of each of the changes follows after the marked-up term.

Model flexibility term

(1) An employer and employee covered by this enterprise agreement may agree to make an individual flexibility arrangement to vary the effect of terms of the agreement if:

(a) the arrangement ~~agreement~~ deals with 1 or more of the following matters:

(i) arrangements about when work is performed;

(ii) overtime rates;

(iii) penalty rates;

(iv) allowances;

(v) leave loading; and

(b) the arrangement meets the genuine needs of the employer and employee in relation to ~~1 or more of~~ the matters it deals with;~~mentioned in paragraph (a);~~ and

(c) the arrangement is genuinely agreed to by the employer and employee, without coercion or duress.

(2) An individual flexibility arrangement may only be made after the individual employee has commenced employment with the employer.

(3) If the employer proposes to enter into an individual flexibility arrangement, the employer must provide a written proposal to the employee. Where the employee's understanding of English is limited, the employer must take measures, including translation into an appropriate language, to ensure the employee understands the proposal.

(4) If the employer proposes to enter into an individual flexibility arrangement, the employer must meet with the employee to discuss the proposal prior to entering the individual flexibility arrangement.

(5) The employer or employee may appoint a person or employee organisation to provide the employer or employee (as the case may be) with support or representation for the purposes of discussions regarding a proposed individual flexibility arrangement.

(6~~2~~) The employer must ensure that the terms of the individual flexibility arrangement:

(a) are about permitted matters under section 172 of the *Fair Work Act 2009*; and

(b) are not unlawful terms under section 194 of the *Fair Work Act 2009*; and

(c) result in the employee being better off overall than the employee would be if no arrangement was made.

(7~~3~~) The employer must ensure that the individual flexibility arrangement:

(a) is in writing; and

(b) includes the name of the employer and employee; and

(c) is signed by the employer and employee and if the employee is under 18 years of age, signed by a parent or guardian of the employee; and

(d) includes details of:

(i) the terms of the enterprise agreement that will be varied by the arrangement; and

(ii) how the arrangement will vary the effect of the terms; and

(iii) how the employee will be better off overall in relation to the terms and conditions of his or her employment as a result of the arrangement; and

(e) states the day on which the arrangement commences.

(8~~4~~) The employer must give the employee a copy of the individual flexibility arrangement within 14 days after it is agreed to.

(9) The employer will review the individual flexibility arrangement to ensure that the employee remains better off overall in relation to the terms and conditions of the employee's employment as a result of the arrangement. A review shall be conducted:

(a) where the employee changes classification;

(b) where an employee paid junior rates has a birthday;

(c) where there is a wage increase in this enterprise agreement;

(d) otherwise, no less than annually.

(10) Where the findings of the review referred to in clause (9) above, suggest that an employee may not be better off as a result of the arrangement, the employer will advise the employee of the findings.

(11) The employer or employee may use the dispute settlement procedure in this enterprise agreement to deal with disputes that may arise concerning the matters dealt with in the individual flexibility arrangement.

(12~~5~~) The employer or employee may terminate the individual flexibility arrangement:

(a) by giving no more than 28 days written notice to the other party to the arrangement; or

(b) if the employer and employee agree in writing—at any time.

(13) The following clause applies only to the employer if the employer is a "relevant employer" under the *Workplace Gender Equality Act 2012*, for example, because the employer employs 100 or more employees or are part of a corporate structure with 100 or more employees in total across all entities.

(14) Within a reasonable period of each anniversary of the commencement of this enterprise agreement, the employer will make a deidentified record of the following information for the previous year:

(a) The number of individual flexibility arrangements entered into.

(b) The number of individual flexibility arrangements that have ended.

(c) The matters dealt with by the individual flexibility arrangements.

(d) The gender breakdown of the employees who have entered into individual flexibility arrangements.

(e) The type of employees (e.g. full-time or part-time) who have entered into individual flexibility arrangements.

(f) The classification of the employees who have entered into individual flexibility arrangements.

(g) The number of employees who entered into an individual flexibility arrangement who are persons from a non-English speaking background, including those for whom the employer provided additional assistance in accordance with clause (3).

(15) Subject to clause (17), the employer will provide the information referred to in clause (14) to the Fair Work Commission within 90 days of each anniversary of the commencement of this enterprise agreement for the purposes of the General Manager of the Fair Work Commission conducting research required by s.653 of *Fair Work Act 2009*.

(16) Subject to clause (17), if requested by an employee or employees, or their representative, the employer will provide the information referred to in clause (14) where the request is made as part of:

(a) an agreed consultation process;

(b) a dispute concerning gender equity or flexible workplace arrangements; or

(c) bargaining for a new enterprise agreement.

(17) The employer is not required to provide the information contained in (d) to (f) if the information would have the effect of identifying the employee or employees to whom it applies.

Note: In addition to this clause, the National Employment Standards of the *Fair Work Act 2009* give some employees the right to request flexible working arrangements in certain circumstances.

Change to Subclause 1(a) – Consistent Wording

The ACTU proposes removing the word "agreement" from subclause 1(a) of the current Model Flexibility Term and in its place substituting the word "arrangement". The wording change would provide more consistent language within the model term and would more accurately describe the instrument.

Change to Subclause 1(b) – Removal of "1 or More"

The ACTU proposes removing the words "1 or more" from subclause 1(b) of the current Model Flexibility Term. Paragraph 202(1)(a) of the FW Act requires that enterprise agreements contain a flexibility term that allow an IFA to vary the effect of the agreement in order to meet the genuine needs of the employer and employee. The current model term could be construed, if read literally, as providing that only 1 of several matters dealt with in the individual flexibility

arrangement ("**IFA**") need meet the genuine needs of the parties. The proposed amendment seeks to better reflect the wording of paragraph 202(1)(a) of the FW Act. Notably the comparable modern award term does not share the wording of the current Model Flexibility Term in this respect.

Change to Subclause 1(c) – Without Coercion and Duress

The ACTU proposes that subclause 1(c) be amended to provide expressly that IFAs are not to be entered into because one party has coerced or applied duress to the other party. A similar clause appears in the comparable modern award term. The ACTU submits that the proposed amendment would likely assist the parties in better understanding their obligations under the FW Act, as well as furthering the objects of the Act, in particular, the object contained in s.3(c) of the FW Act concerning ensuring that "wages and conditions can no longer be undermined by the making of statutory individual employment agreements of any kind".

New Clause 2 – Only After Commencement

The proposed new clause 2 of the Model Flexibility Term would provide that an IFA could only be entered into after an employee had commenced employment. A similar clause appears in the comparable modern award term and its inclusion would assist the model term to promote a greater understanding of parties' obligations under the FW Act. The clause was introduced into the Standard Modern Award Term by a Full Bench of the Commission in *Application by National Retail Association* [2013] FWCFB 2170 (15 April 2013) following the Commission becoming aware of an inappropriate practice of IFAs being offered as a condition of employment contrary to the intent of the model flexibility term and the FW Act.[15] To introduce the clause into the Model Flexibility Term would assist employers be aware of their obligations under the FW Act, and be consistent with the object contained in subsection (3)(c) of the FW Act.

New Clause 3 – Written Proposal Appropriately Communicated

The proposed new clause 3 would introduce the requirement from the comparable modern award term that an employer must provide a written proposal of the IFA, and in an appropriate form where the employee's understanding of English is limited. The clause, which appears in the comparable modern award term, is an appropriate safeguard given that an IFA may vary the effect of an enterprise agreement, including in a manner that need only be better off overall at the time of entering the IFA.

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[15] See paragraph [209].

New Clauses 4 & 5 – Meet with Employee

The proposed new clause 4 seeks to introduce an obligation on the employer to meet with the employee in circumstances where the employer proposes an IFA. That a best practice employer should meet with an employee to discuss an IFA is provided in the Fair Work Ombudsman's "Use of Individual Flexibility Arrangements Best Practice Guide" ("**the FWO IFA Best Practice Guide**"). In particular the guide observes on page 6:

> *"IFAs are intended to be beneficial for both the employee and employer. Best practice employers meet with their employees to discuss individual circumstances that meet the needs of both the business and the employee. That means you both must understand what each other's needs are so you can reach a genuine agreement."*

A copy of the **FWO IFA Best Practice Guide** is attached to these submissions and marked "**A-1**".

It would appear an uncontroversial proposition that parties meeting to discuss a proposal is more likely to lead to an agreed position that genuinely meets the needs of both parties.

The proposed new clause 5 would make explicit that an employee is able to have a support person or representative to assist them with respect to the meeting. The clause would be consistent with the FWO IFA Best Practice Guide that an employer consider "inviting the employee to bring a support person to discussions to help explain the terms and effects of the IFA"[16] and would further advance the object of the FW Act contained in s.3(e) to provide a balanced framework for cooperative and productive workplace relations by "enabling fairness and representation at work and the prevention of discrimination by recognising the right to freedom of association and the right to be represented".

New Clause 9 and 10 – Review of IFA

The proposed new clause 9 of the Model Flexibility Term would provide an obligation on the employer to conduct a review of the IFA in certain circumstances (and no less than annually). Having conducted that review, the proposed new clause 10 would place an obligation on the employer to communicate the outcome of the review if the IFA is no longer operating so that the

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[16] Page 7 of the FWO IFA Best Practice Guide recommends consideration being given where there is a concern about the employee's understanding.

employee is better off overall as a result of the arrangement. The ACTU's proposal is a simplified version of what the FWO suggests is best practice in the FWO IFA Best Practice Guide on page 8:

> *Regular reviews*
>
> *Over time, an IFA might no longer be practical or appropriate for you or your employee. This may be because the employee's needs or the requirements of the business have changed. Alternatively, it may be because entitlements under their award or registered agreement have changed.*
>
> *It is therefore important that you review IFAs regularly (at least annually) to ensure the entitlements of the employee under the IFA don't fall below their award or registered agreement. This is important when circumstances change, for example when:*
>
> - *an employee is promoted to a new classification*
> - *a junior employee has a birthday*
> - *the pay rates under awards are reviewed (this occurs annually in July)*
> - *wage increases take effect under a registered agreement.*
>
> *Best practice employers will schedule regular discussions with an employee to make sure their IFA is operating in a way that meets everyone's needs. Depending on the nature of the IFA, these meetings may be monthly, bi-annually, annually or as needed.*

The ACTU acknowledges that a review mechanism for award flexibility terms was considered in the context of the 2012 Transitional Review of Modern Awards and that the Commission declined to amend introduce such a mechanism.[17] The particular mechanism was put forward by Hair and Beauty Australia as follows:

> "7.10 The employer will be responsible to conduct an annual review of the terms of the Individual Flexibility Agreement in line with the Annual Wage Review and changes in the Award in order to ensure that the individual remains better off overall under the agreement in relation to the employee's terms and conditions of employment in comparison to that of the Award."

[17] See *Application by National Retail Association* [2013] FWCFB 2170 (15 April 2013) {203] to [206}.

As the Full Bench noted, at the time the proposal received little, or no, support and Hair and Beauty Australia did not seek to support the proposal with written submissions.

The proposal now put by the ACTU differs in certain key respects. Firstly, the proposal does not seek to require an employer to "ensure that the individual remains better off at all times" only that the IFA be reviewed. Secondly, the proposal is, self-evidently, not for the requirement to be included in a modern award, but in an enterprise agreement and need not be agreed by an employer if the employer is opposed to the review process. Thirdly, the proposal arises in a different legislative context, including that the Commission consider "best practice". A system of regular review of IFA is described by the FWO as "best practice".

The ACTU further submits that an IFA, if considered as an instrument with ongoing application, beyond the moment at which it is agreed, is significantly more likely to meet the genuine needs of both parties (the purpose of the arrangement under s.202(1) of the FW Act) if it is regularly reviewed.

New Clause 11 – Availability of Dispute Procedure

The proposed new clause 9 of the Model Flexibility Term would alert the parties to the availability of the dispute resolution mechanism in the enterprise agreement to resolve disputes arising under the IFA. The proposal would not bring any substantive change to the rights of the parties under an IFA however, would assist the parties be aware of a potential mechanism for the resolution of disputes.

New Clauses 13 to 17 – Record Keeping and Provision of Information

The proposed new clauses 13 to 17 would establish a mechanism for the creation of records containing information about how an employer uses IFAs. The proposal would only apply to those employers who are "relevant employers" under the *Workplace Gender Equality Act 2012* ("**the WGE Act**"). Relevant employers under the WGE Act are defined in s.4 as follows:

> ***Meaning of relevant employer***
>
> *(1) A **relevant employer** means:*
>
> *(a) a registered higher education provider that is an employer; or*
>
> *(b) a natural person, or a body or association (whether incorporated or not), that is an employer of 100 or more employees in Australia; or*
>
> *(c) a Commonwealth company that is an employer of 100 or more employees in Australia; or*

(d) a Commonwealth entity that is an employer of 100 or more employees in Australia.

*(2) However, a **relevant employer** does not include:*

(a) a State; or

(b) a Territory; or

(c) a body (whether incorporated or not) established for a public purpose by or under a law of a State or Territory, other than a registered higher education provider; or

(d) the holder of an office established for a public purpose by or under a law of a State or Territory; or

(e) an incorporated company over which a State, a Territory or a body referred to in paragraph (c) is in a position to exercise control.

*(3) For the purpose of the definition of **relevant employer** in subsection (1):*

(a) if the relevant employer is a corporation:

(i) a corporation employs a person where the person is employed by another corporation which is a subsidiary of the first - mentioned corporation; and

(ii) the question whether a corporation is a subsidiary of another corporation is to be determined as it would be determined for the purposes of the Corporations Act 2001 ; and

(b) if the relevant employer is a Commonwealth company--a Commonwealth company employs a person if the person is employed by another Commonwealth company which is a subsidiary (within the meaning of the Public Governance, Performance and Accountability Act 2013) of the first - mentioned Commonwealth company; and

(c) if the relevant employer is a Commonwealth entity that is a corporate Commonwealth entity (within the meaning of the Public Governance, Performance and Accountability Act 2013)--the corporate Commonwealth entity employs a person if the person is employed by another corporate Commonwealth entity which is a subsidiary (within the meaning of that Act) of the first - mentioned corporate Commonwealth entity.

(4) If, at any time, an employer ceases to be a relevant employer because the number of employees of the employer falls below 100, this Act continues to apply to the employer

as if the employer were a relevant employer unless and until the number of employees falls below 80.

Under s.13 of the WGE Act, a relevant employer is obliged to prepare a written report containing information relating to the employer and to gender equality indicators prescribed by legislative instrument. The matters contained in the most recent Women's Gender Equality Agency mandatory questionnaire include, but are not limited to, information about whether an employer has policies and procedures in place with respect to the gender pay gap and workplace flexibilities, as well as what flexibilities are offered to employees. A copy of the most recent Gender Pay Gap questionnaire is attached to this submission and marked "A-2".

It is submitted that the additional regulatory burden created by the ACTU proposed new clauses would be lesser than it otherwise might be in practice because the information proposed to be the subject of the new clauses would, in any event, be directly relevant to the mandatory reporting imposed on employers under the WGE Act.

In addition to the recording of information, the proposed new clause 15 also seeks, at least in a provisional way, and entirely subject to the view of the Commission, to assist in what has long been a practical difficulty in the collection of data regarding the content of IFAs in the context of the General Manager's obligation to conduct research pursuant to s.653 of the FW Act.[18]

The proposed new clause 16 would also require the information to be shared with employees and their representatives in certain limited circumstances. Firstly, where the employer and employees agree to a consultation process that includes the consideration of such data. Secondly, in the context of a dispute concerning gender equity or flexible working arrangements, where it may be likely that such information would be relevant to the dispute. Thirdly in the context of bargaining for a replacement agreement.

When bargaining for a replacement enterprise agreement, if parties are to consider the needs of employees and the employer for flexibility, including the terms of any new flexibility term, deidentified information concerning the use of the flexibility term in the current enterprise agreement would clearly be useful. In this way, the proposed change would advance one of the FW Act's principal objectives, to provide a framework for cooperative workplace relations, and

[18] See for example the Commission's Modern Award Review 2023-24 Report (18 July 2024) at paragraph [110].

further one that allows participants in that system to consider gender equality and flexibility in the context of relevant information.

The proposed introduction of mechanisms to address gender equality, follows the legislature's recent amendments to s.3(a) of the FW Act made by the *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Act 2022.* In making those amendments, the legislature sought, *inter alia*, to embed the principles of job security and gender equality in the Fair Work Commission's decision-making processes. As the Explanatory Memorandum to the *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Bill 2022* provided:

> *334. The reference to promoting job security recognises the importance of employees and job seekers having the choice to be able to enjoy, to the fullest extent possible, ongoing, stable and secure employment that provides regular and predictable access to beneficial wages and conditions of employment. The reference to promoting gender equality recognises the importance of people of all genders having equal rights, opportunities and treatment in the workplace and in their terms and conditions of employment, including equal pay. The intention of the references to 'gender equality' in each of these provisions is to use language that is consistent with the Convention on the Elimination of All Forms of Discrimination against Women and ILO Convention concerning Discrimination in Respect of Employment and Occupation (No 111). It is also intended to reflect the policy objective of both formal and substantive gender equality.*
>
> *335. Job security and gender equality would sit alongside existing considerations in the object of the FW Act, such as providing workplace relations laws that are flexible for business, assisting employees to balance their work and family responsibilities, and achieving productivity and fairness (see existing paragraphs 3(a), (d) and (f)).*

Finally, the ACTU notes that the proposal is framed so that small and smaller medium sized businesses, would effectively be excluded from the operation of the new clauses through the reliance on the definition of "relevant employer" in the WGE Act. The proposed exclusion recognising the particular circumstances of those employers, is consistent with the object contained in 3(g) of the FW Act.

New Note at End of Clause

The proposed new note at the end of the Model Flexibility Term seeks to alert parties to other rights and responsibilities with respect to flexibility under the FW Act. Although in a different context, the provision of a note in that regard would be consistent with the decision of the recent Full Bench of the Decision in [2023] FWCFB 107, where the Commission, in response to amendments to the FW Act with respect to requests for flexibility varied modern awards to

include a term referring to the NES, along with a note referring to the new dispute resolution jurisdiction under s 65B of the FW Act.

Proposed Changes to the Model Consultation Term

The ACTU proposes that the Fair Work Commission adopt a new Model Consultation Term, that differs in a number of respects from the wording currently contained in the Model Consultation Term contained in Schedule 2.3 of the FW Regulations.

The proposed changes are detailed on the pages that follow in "marked-up" form using the current term as a base. The ACTU's submissions in support of each of the changes follows after the marked-up term.

Model consultation term

Application of Consultation Term

(1) This term applies if the employer:

(a) proposes~~has made a definite decision~~ to introduce a major change ~~to production, program, organisation, structure or technology~~ in relation to its enterprise that is likely to have a significant effect on the employees; or

(b) proposes to introduce a change to the regular roster or ordinary hours of work of employees.

General Requirement to Consult

(2) The employer must consult with any employees affected by the proposed change referred to in (1), as well as their representatives (if any). When consulting the employer must afford the employees and their representatives (if any) a genuine opportunity to contribute to and influence the proposed change.

(3) The employer must not introduce the change prior to meeting the requirement to consult in clause (2).

Consultation Process Required for Major change

(4) For the purpose of facilitating the consultation required by this term in circumstances where the employer proposes to introduce a major change referred to in subclause (1)(a), clauses (5) to (11) and (18) and (22), apply.

Employer Must Notify Employees and Representatives

~~(2) For a major change referred to in paragraph (1)(a):~~

(5~~a~~) T~~t~~he employer must notify the relevant employees and their representatives (if any) of the ~~decision~~ proposal to introduce the major change.~~; and~~

~~(b) subclauses (3) to (9) apply.~~

~~(3) The relevant employees may appoint a representative for the purposes of the procedures in this term.~~

~~(4) If:~~

~~(a) a relevant employee appoints, or relevant employees appoint, a representative for the purposes of consultation; and~~

~~(b) the employee or employees advise the employer of the identity of the representative;~~

~~the employer must recognise the representative.~~

Discussions and Information

(6~~5~~) As soon as practicable after proposing to introduce the major change~~making its decision~~, the employer must:

(a) discuss with the relevant employees and their representatives (if any):~~:~~

(i) the introduction of the change; and

(ii) the effect the change is likely to have on the employees; and

(iii) measures the employer is taking to avert or mitigate the adverse effect of the change on the employees; and

(b) for the purposes of the discussion—provide, in writing, to the relevant employees and their representatives (if any):~~:~~

(i) all relevant information about the change including the nature and expected duration of the change proposed; and

(ii) information about the expected effects of the change on the employees; and

(iii) any other matters likely to affect the employees.

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(7~~6~~) However, the employer is not required to disclose confidential or commercially sensitive information to the relevant employees.

Genuine Consideration Prior To Implementation of Change

(8~~7~~) The employer must give prompt and genuine consideration to matters raised about the major change by the relevant employees and their representatives (if any), prior to the implementation of the change. ~~.~~

(9) The employer will take reasonable steps to communicate the outcome of the consultation process including the consideration of matters raised about the major change by the relevant employees and their representatives (if any).

Exception Where Agreement Provides for a Major Change

(10~~8~~) If a term in this agreement provides for ~~a~~ the introduction of a major change in~~to production, program, organisation, structure or technology in~~ relation to the enterprise of the employer, the requirements to consult contained in clauses (2) to (9) ~~s set out in paragraph (2)(a) and subclauses (3) and (5)~~do not ~~are taken not to~~ apply~~.~~ For the avoidance of doubt, this clause does not affect the application of any other consultation procedures that may be contained in this agreement concerning the introduction of a major change in accordance with such a term.

Meaning of "Significant Effect"

(11~~9~~) In this term, "~~a major change is *likely to have a*~~ significant effect" on employees, includes, but is not limited to, any of the following: ~~if it results in:~~

(a) the termination of the employment of employees; or

(b) major change to the composition, operation or size of the employer's workforce or to the skills required of employees; or

(c) loss~~the elimination~~ or reduction in~~diminution of~~ job or promotion opportunities; ~~(including opportunities for promotion or tenure);~~ or

(d) loss of, or reduction in, job tenure or job security; or

(e) the alteration of hours of work (including a change to a roster or shift pattern); or

~~(e) the need to retrain employees; or~~

(f) the need for employees to be retrained or transferred to other work or locationsrelocate employees to another workplace; or

(g) jobthe restructuring of jobs.

Consultation Process Required for Change to Rregular Rroster or Oordinary Hhours of Wwork

(120) For the purpose of facilitating the consultation required by this term in circumstances where the employer proposes introduce a change to the regular roster or ordinary hours of work referred to in subclause (1)(b), clauses (13) to (22) apply.

Employer Must Notify Employees and Representatives

(13) For a change referred to in paragraph subclause (1)(b) :

(a) the employer must notify the relevant employees and their representatives (if any) in writing of the proposed change.; and

(b) subclauses (11) to (15) apply.

Discussions and Information

(11) The relevant employees may appoint a representative for the purposes of the procedures in this term.

(12) If:

(a) a relevant employee appoints, or relevant employees appoint, a representative for the purposes of consultation; and

(b) the employee or employees advise the employer of the identity of the representative;

the employer must recognise the representative.

(143) As soon as practicable after proposing to introduce the change, the employer must:

(a) discuss with the relevant employees and their representatives (if any) about the introduction of the change; and

(b) for the purposes of the discussion—provide to the relevant employees and their representatives (if any):

(i) all relevant information about the change, including the nature and expected duration of the change; and

(ii) information about what the employer reasonably believes will be the effects of the change on the employees, including any change in employee's remuneration; and

(iii) information about any other matters that the employer reasonably believes are likely to affect the employees; and

(c) invite the relevant employees and their representatives (if any) to give their views about the impact of the change (including any impact in relation to their family or caring responsibilities).

(15~~14~~) However, the employer is not required to disclose confidential or commercially sensitive information to the relevant employees and their (representatives (if any).

Genuine Consideration Prior To Implementation of Change

(16~~15~~) The employer must give prompt and genuine consideration to matters raised about the change by the relevant employees and their representatives (if any).

(17) The employer will take reasonable steps to communicate the outcome of the consultation process including the consideration of matters raised about the change by the relevant employees and their representatives (if any).

Reasonable Steps to Assist Employees Understand Consultation

(18) Where information is provided as part of the consultation process, if the employer is aware that an employee has, or reasonably should be aware that the employee may have, limited understanding of written or spoken English, take reasonable steps to ensure that the employee understands the information provided. This may include translation into an appropriate language.

Employee Representatives

(19) Subject to clause (20), employee representatives of the relevant employees for the purposes of consultation in this term includes:

(a) a person a relevant employee advises the employer is their representative for the purposes of the procedures in this term;

(b) a workplace delegate of the relevant employees if the employer has been notified by the delegate or an employee organisation that the person is a workplace delegate; and

(c) any employee organisation covered by the enterprise agreement who is entitled to represent the industrial interests of the relevant employees

(20) A workplace delegate or an employee organisation will not be an employee representative of a relevant employee if the employee has appointed another person under paragraph (25)(a) as his or her representative for the consultation, or has revoked the status of the workplace delegate or organisation as his or her representative for the consultation.

(21) For the avoidance of doubt, a representative may include a natural person or an employee organisation.

Meaning of Terms

(22~~16~~) In this term:

(a) ***employees*** includes the singular;

(b) ***employer*** may include more than one employer if the enterprise agreement applies to more than one employer;

(c) ***relevant employees*** means the employees who may be affected by a change referred to in subclause (1);~~.~~and

(d) ***workplace delegate*** means a workplace delegate within the meaning of section 350C(1) of the *Fair Work Act 2009* .

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Insertion of Headings

The proposed amendments to the Model Consultation Term include the insertion of headings in an attempt to improve the readability of term. The headings are not intended to change the meaning of the clause.

Change to Subclause 1(a) – Removal of Definite Decision

The proposed amendments to subclause 1(a) include a move away from the concept of "definite decision". The ACTU acknowledges that to do so would depart from the comparable modern award provision and the wording of the TCR test cases. Instead of maintaining the trigger of a "definite decision", the ACTU proposes an approach that seeks to focus less on potential arguments over whether the employer is considering a major change, has made a "decision" about major change or has made a "definite decision" about a major change, but rather endeavours to redirect the parties attention to the substantive purpose of consultation, that is, that employees are afforded a genuine opportunity to influence the effect that the major change is likely to have on them.

The ACTU's proposal should necessarily be read in the context of the proposed new clause 2, which seeks to capture these critical elements of consultation in the form of a "general requirement".

In removing the reference to "definite decision" the ACTU suggests the adoption of what, respectfully, appears to be the more straight forward approach that was taken by the Commission in relation to Modern Awards with respect to changes that apply to regular rosters or ordinary hours [19]

Change to Subclause 1(a) – Removal of Production, Program Etc

The other change proposed to subclause 1(a) is to remove the limitation on consultation being only applicable to certain types of major change that are likely to have a significant effect. In particular, the removal of the words "to production, program, organisation, structure or technology". It is submitted that if it is accepted as a matter of policy that consultation is

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[19] See *Application by National Retail Association* [2013] FWCFB 2170 (15 April 2013)

important in relation to major changes that are likely to have a significant effect on employees, that obligation should not be limited to only certain sorts of major change.

Further, the ACTU's proposal to remove the words of limitation would bring the Model Consultation Term into closer alignment with the requirements of s.205(1)(a) of the FW Act, which, on their face, do not refer to any type major change that is likely to have a significant effect on the employees being excluded.

The ACTU also submits that the proposed change would be more consistent with what the FWO has identified as "best practice". Notably nowhere in the FWO Best Practice Guide on Consultation and Cooperation in the Workplace does it suggest best practice involves limiting consultation only to matters involving a major change "to production, program, organisation, structure or technology". Indeed, the FWO best practice goes substantially beyond what is proposed by the ACTU.

A copy of the FWO Best Practice Guide on Consultation and Cooperation in the Workplace is attached to this submission and marked "**A-3**".

New Clause 2 and 3 – General Requirement to Consult

The proposed new clauses 2 and 3 would provide an express and direct requirement to consult. The proposed clauses are not however intended to replace the specific incidents of consultation in the current Model Consultation Term, but to draw those incidents together by giving them explicit context and purpose.

The meaning of "consult" in a workplace relations context has regularly been the subject of consideration by courts and tribunals. Notably, the meaning of consult was examined by a Full Bench of the Commission in the decision that led to the making of the standard modern award term regarding consultation with respect to a change to regular rosters or ordinary hours:

> ***[28]*** *The obligation in s.145A(1)(a) is 'to consult [with] employees'. In this context the word 'consult' is used as a verb and is defined in the Oxford Dictionary in these terms:*
>
> *"Consult with. To take counsel with; to seek advice from."*
>
> ***[29]*** *The definition in the Macquarie Dictionary (5th Edition) is in similar terms:*

*"**1.** To seek counsel from; ask advice of. **2.** to refer to for information. **3.** to have regard for (a person's interest, convenience, etc.) in making plans.*

*- v.i **4.** (sometimes fol. by with) to consider or deliberate; take counsel; confer [L. Deliberate, take counsel]"*

[30] *The word 'consult' means more than the mere exchange of information. As Young J said in Dixon v Roy*

"The word 'consult' means more than one party telling another party what it is that he or she is going to do. The word involves at the very least the giving of information by one party, the response to that information by the other party, and the consideration by the first party of that response." [citations omitted]

[31] *The right to be consulted is a substantive right, it is not to be treated perfunctorily or as a mere formality. Inherent in the obligation to consult is the requirement to provide a genuine opportunity for the affected party to express a view about a proposed change in order to seek to persuade the decision maker to adopt a different course of action. As Logan J observed in Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia v QR Limited (QR):*

"... A key element of that content [of an obligation to consult] is that the party to be consulted be given notice of the subject upon which that party's views are being sought before any final decision is made or course of action embarked upon. Another is that while the word always carries with it a consequential requirement for the affording of a meaningful opportunity to that party to present those views. What will constitute such an opportunity will vary according the nature and circumstances of the case. In other words, what will amount to "consultation" has about it an inherent flexibility. Finally, a right to be consulted, though a valuable right, is not a right of veto.

To elaborate further on the ordinary meaning and import of a requirement to "consult" may be to create an impression that it admits of difficulties of interpretation and understanding. It does not. Everything that it carries with it might be summed up in this way. There is a difference between saying to someone who may be affected by a proposed decision or course of action, even, perhaps, with detailed elaboration, "this is what is going to be done" and saying to that person "I'm thinking of doing this; what have you got to say about that ?". Only in the latter case is there "consultation. ..."

[32] *We respectfully adopt his Honour's observations. Similar to the obligation to accord a person procedural fairness, the precise content of an obligation to consult will depend on the context. The extent and significance of a proposed change, in terms of its impact on the affected employees, will have a bearing on the extent of the opportunity to be provided. Hence a change of limited duration to meet unexpected circumstances may mean that the opportunity for affected employees to express their views may be more limited than would be the case in*

> *circumstances where the proposed change is significant and permanent. It is also relevant to note that while the right to be consulted is a substantive right, it does not confer a power of veto. Consultation does not amount to joint decision making.* [20]

The relevance of consultation to genuine redundancy and the unfair dismissal jurisdiction have led to the meaning of consult and the requirements of consultation also being summarised on page 97 of the Fair Work Commission's Unfair Dismissal Bench Book:

> *Consultations should be meaningful and should be engaged in before an irreversible decision to terminate has been made.*[21]
>
> *'Consultation is not perfunctory advice on what is about to happen … [c]onsultation is providing the individual, or other relevant persons, with a bona fide opportunity to influence the decision maker.'*[22]
>
> *'The purpose of a consultation clause is to facilitate change where that is necessary, but to do that in a humane way which also takes into account and derives benefit from an interchange between worker and manager.'*[23]
>
> *The following was observed by Sachs LJ in Sinfield v London Transport Executive:*
>
>> *Consultations can be of very real value in enabling points of view to be put forward which can be met by modifications of a scheme and sometimes even by its withdrawal. Any right to be consulted is something that is indeed valuable and should be implemented by giving those who have the right an opportunity to be heard at the formative stage of proposals – before the mind of the executive becomes unduly fixed.*[24]

It is in the context of such observations that the ACTU has proposed the words of the new clause 2 and 3, seeking in effect to ensure that an employee is provided with "a bona fide opportunity to influence the decision maker" at a "formative stage" before the mind of the employer is "unduly fixed" and (unequivocally) *prior* to the effects of the major change taking place.

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[20] [2013] FWCFB 10165

[21] *Construction, Forestry, Mining and Energy Union v Newcastle Wallsend Coal Company* Print R0234 (AIRCFB, Ross VP, MacBean SDP, Deegan C, 21 December 1998) at paras 78–80, [(1998) 88 IR 202]; cited in *Steele v Ennesty Energy Pty Ltd T/A Ennesty Energy* [2012] FWA 4917 (Jones C, 21 June 2012) at para. 20

[22] *Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia v Vodafone Network* Pty Ltd PR911257 (AIRC, Smith C, 14 November 2001) at para. 25.

[23] *Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia v QR Ltd (No 2)* [2010] FCA 652 (22 June 2010) at para. 49

[24] *Sinfield v London Transport Executive* [1970] Ch 550 at 558.

Proposed New Clause 4 and Changes to Current Clause 2 (new Clause 5) - Mechanical Provisions

The majority of the amendments proposed by the introduction of a new clause 4 and to the current clause 2 (new clause 5) are to make consequential changes to mechanical provisions and/or seek to improve the readability of the term.

Change to Current Clause 2 (new Clause 5)– Insertion of "Proposal" and "and their representative (if any)"

The proposed amendments to the current clause 2 (new clause 5) of the Model Consultation Term include the deletion of "decision" and insertion of "proposal" which are consequential changes flowing from the removal of "definite decision" earlier in the term.

The proposed amendments also include the inclusion of "and their representatives (if any)" within the express cohort of those who are to be notified of a proposed change. The amendment is consistent with how representatives are treated in the comparable modern award term and reflects (although more clearly) the substance of the current term in that relevant employees may appoint representatives for the purposes of the procedures of the clause.

Deletion of Current Clause 3 and 4 – Appointment of Representatives

The proposed deletion of the current clause 3 and 4 is contingent upon and consequential to other proposals being adopted with respect to how representation is provided for.

Change to Current Clause 5

The ACTU proposes a number of amendments to what is currently clause 5 (new clause 6). The changes include:

(a) A change from "making its decision" to "proposing to introduce the major change" as the trigger for this stage of the consultation. The change is consistent with the amendments to subclause 1(a) with respect to "definite decision" and effectively proposes to adopt the approach currently used in the Model Consultation Term with respect to a change to regular rosters or ordinary hours.

(b) A change to introduce the words "and their representatives (if any)" in a manner similar common to other parts of the term, including the current clause 2 (new clause 5).

(c) A change to expressly include the provision of the duration of the change as part of all relevant information about the change. The proposal is to seek to ensure that this aspect of the change, which may be key to its effects, is not overlooked by the parties.

Change to Current Clause 7 (New Clause 8) – Consideration Prior to Implementation

The proposed amendment to current clause 7 (new clause 8) would make explicit that genuine and prompt consideration of matters raised by relevant employees and their representatives must occur *prior* to the implementation of the change. The proposal is posited on the basis that the Model Consultation Term would better meet the intended requirements of s.205 of the FW Act if the requirement was made explicit in the term.

New Clause 9 – Feedback At End of Consultation

The proposed new clause 9 provides a requirement for the employer to inform the relevant employees and their representatives (if any) of the outcome of the consultation and feedback in relation to the matters raised. The mechanism does not form part of the comparable modern award term, however, an earlier Full Bench flagged that such a requirement "had merit" and may be subsequently considered:

> [101] We do, however, see some merit in a provision requiring the employer to inform the affected employee and their representative, if any, of the outcome of their consideration of the views provided to them regarding the impact of the proposed change. However, a provision in those terms was only the subject of limited argument in the proceedings before us and given the time constraint imposed by the transitional provision it is not practical to seek the views of interested parties before we are obliged to make a determination. In the circumstances we propose to give this issue further consideration in the context of the 4 yearly review.[25]

The FWO Best Practice Guide to Cooperation and Consultation in the workplace, as part of its Best Practice checklist, on page 11, expressly includes feedback to employees:

> ***Best practice checklist***
>
> - *A best practice workplace involves more than just understanding and complying with the law. This checklist will help you work at best practice:*

[25] [2013] FWCFB 10165

- ***Set your business up for good communication.*** *You can do this by implementing an internal communication strategy, establishing good communication channels and setting clear standards for communication in your workplace. Remember:*
    - *key messages should be clear, consistent and given with context*
    - *select communication channels carefully*
    - *the communication should invite responses*
    - *seek feedback on how your employees are receiving your communications.*
- ***Analyse the change.*** *Use a SWOT analysis (or similar) to help you identify the key strengths, weakness, opportunities and threats associated with the proposed change. Use your analysis to identify issues and inform the key messages for staff.*
- ***Decide on a consultation strategy.*** *Plan how you will consult your employees. When developing your consultation strategy consider:*
    - *How will you help your employees understand the change and its potential impact on them?*
    - *How will management and employees work together to identify and solve issues?*
- ***Review your position about the change.*** *Consider the information and ideas shared by staff.*
- ***Inform employees.*** *Communicate the decision and reasons with employees and representatives.*
- ***Implement the required changes.***

The ACTU submits that providing the outcome and giving reasons is an important part of any consultation process, recognising, that the working of such processes potentially have a role beyond any particular change in so far as they have the potential to foster more co-operative and productive workplaces.[26]

In that context, the ACTU notes the comments of Murphy J of the High Court in the passage below which was quoted by the Full Federal Court in *QR Limited v Communications Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia* [2010] FCAFC 150 at paragraph [14]:

> *"During this generation, there has been an accelerating trend towards concentration of economic power in fewer and fewer persons. The growth of the great national corporations, their mergers and expansion into transnationals have transformed the methods of production, distribution and exchange. The power of the greatest*

[26] Both objects of the FW Act.

> *corporations transcends that of most governments. A reaction to the submergence of the individual worker is the demand by organized workers for some share in deciding what work is to be done, by whom and when, where, and how it is to be done.* ***The thrust of the demand is not merely the improvement in existing pay and conditions. It extends to the protection of jobs, for themselves treated as more than wage-hands – to be treated as men and women who should be informed about decisions which might materially affect their future, and to be consulted on them. It is a demand to be emancipated from the industrial serfdom which will otherwise be produced by the domination of the corporations; a demand to be treated with respect and dignity.***"[27] [emphasis added]

The ACTU respectfully submits that the observations of Murphy J remain apt.

For all of the above reasons, the ACTU submits that it is appropriate that the Model Consultation Term requires that the employer advises the relevant employees and their representatives (if any) of the outcome of the consultation and the reasons for the final decision on the implementation of the change.

Change to Current Clause 8 (New Clause 10) – Update of Machinery Provision

The proposed amendments to the current clause 8 (the new clause 10) are intended to do no more than update the existing exclusions to cover the equivalent new clauses.

Change to Current Clause 9 (New Clause 11) – Meaning of "significant effect"

The proposed amendments to the current clause 9 (new clause 11) affect the definition of significant effect in the Model Consultation Term. Under the current term, "significant effect" in relation to a major change appears intended to be defined exhaustively by virtue of the following wording "(9) In this term, a major change is ***likely to have a significant effect on employees*** **if it results in**: …". Notably, the legislative requirement in relation to enterprise agreements and consultation terms in s.205(1)(a) of the Act is not so limited, simply requiring that a consultation term provide that employer must consult with employees about "(i) a major workplace change that is likely to have a significant effect on the employees".

Similarly, the comparable award term does not define significant effect exhaustively providing:

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[27] *Federated Clerks' Union (Aust) v Victorian Employers' Federation* [1984] HCA 53; (1984) 154 CLR 472 at 493-494

*B.5 In clause B significant effects, on employees, **includes** any of the following:*

(a) termination of employment; or
(b) major changes in the composition, operation or size of the employer's workforce or in the skills required; or
(c) loss of, or reduction in, job or promotion opportunities; or
(d) loss of, or reduction in, job tenure; or
(e) alteration of hours of work; or
(f) the need for employees to be retrained or transferred to other work or locations; or
(g) job restructuring. [emphasis added]

The relevant FWO Best Practice Guide goes much further, not only not suggesting a limitation on what may be considered a "significant effect", but drawing no distinction between a proposed change and "a *major* change likely to have a significant effect".

Indeed, if a major change is likely to have a significant effect as that term is ordinarily used, there is no obvious policy reason that it should be limited in the way that it is in the list of matters referred to in the current Model Consultation Term.

For the above reasons, the ACTU has proposed a new definition of significant effect that is based upon the comparable modern award term with the inclusion of "job security" after "job tenure", reflecting the recent changes to the principal object of the Act made to s.3(a). After further consultation with affiliates, the ACTU has also added, for the avoidance of doubt, that significant effect includes a change to a roster or shift patterns.

New Current Clause 10 (New Clause 12) and 13 – Various changes

The proposed amendments to the current clause 10 (new clause 12) and new clause 13 include the following:

(a) An update of the machinery provisions of the term to improve readability / adjust for proposed changes.

(b) An inclusion of "and representatives (if any)" for the same reasons that those words have been included in other proposals.

(c) A requirement that notification of a proposed change to an employee's regular roster or ordinary hours be put in writing. The requirement for notification to be in writing is not a feature of the comparable Modern Award Term. The ACTU also acknowledges that a proposal that *all* information provided in the consultation regarding change or regular roster or ordinary hours was specifically rejected by a Full Bench *in Consultation clause in modern awards* [2013] FWCFB 10165 from [74] to [84]. The ACTU nevertheless presses

that the Model Consultation Term provide, at least at the notification stage, that the actual proposed change be put in writing. It is respectfully submitted that such a requirement is not unreasonable, nor burdensome. It should be entirely uncontroversial that the vast majority of employers and employees who are covered by an enterprise agreement will have reduced the ordinary hours or regular roster that employees are required to work to writing in some form. If those matters are to be altered, it is reasonable that a change to that position be similarly communicated in writing.

Deletion of Current Clause 11 and 12 – Employee Representation

The proposed deletion of clauses 11 and 12 concerning employee representation are contingent on the acceptance of the other changes posited to employee representation, discussed elsewhere in these submissions.

Changes to Current Clauses 13, 14 and 15 (New Clauses 14, 15 and 16)

The proposed amendments to current clauses 13 and 14 (new clause 14 and 15) are as follows:

(a) An inclusion of the words "and employee representatives (if any)" in various places for the reasons dealt with elsewhere in these submissions.

(b) A clarification that "all relevant information" includes the duration of the proposed change.

(c) A clarification that the employer is required to advise what the employer reasonably believes will be the change (if any) in remuneration as a consequence of the change. The change, like that in (b) above, would assist the parties who adopt the model term by identifying key aspects that should be included in the information provided.

New Clause 17 – Feedback

The proposed new clause 17 requiring feedback at the end of the consultation, has been included for the same reason that the new clause 9 has been proposed.

New Clause 18 – Better Communication Taking Into Account Language Skills

The proposed new clause 18 is intended to apply to all of the consultation provisions within the Model Consultation Term. The clause is proposed simply because if information is provided in spoken or written English and an employee has limited understanding of what is being provided to them, the purpose of the term is very significantly undermined. The proposed clause does not

provide a strict obligation however, proposes to require reasonable steps to be taken where the employer knows, or reasonably should know, that providing information in spoken or written English will likely be ineffective. Given the employer reasonably can be taken to have an effective form of communication with the employee in order to provide direction and instructions, the term is, respectfully, not unreasonable.

In further support of the proposal the ACTU submits that to use effective modes of communication is a key aspect of the "best practice" referred to in the FWO Best Practice Guide on Cooperation and Consultation (see pages 6 and 7) and adoption of the ACTU's proposal would further advance the broad object of the FW Act to provide a framework for workplace relations that promotes "social inclusion of all Australians".[28]

New Clause 19 to 21 – Employee Representation

The proposed new clause 19 to 21 seeks to modify the approach to representation to take into account several matters. Firstly, that the FW Act now has specific provision for workplace delegates rights. Secondly, the comparable modern award term no longer utilises the "appointment" mechanism found in the current Model Consultation Term. Thirdly, the Model Consultation Term is – self-evidently - to be included in enterprise agreements. A key difference in terms of representation under a modern award and an enterprise agreement is that employee organisations may, and often do, have an expanded role in relation to the type of instrument by virtue of bargaining and/or being covered by the enterprise agreement.

The proposed changes would have the effect of involving workplace delegates and unions covered by an enterprise agreement in the consultation procedures without a need for appointment. That unions would have such a role is not historically unusual, having been included in the original formulations of the consultation clauses in the TCR test cases. Nor is it inappropriate given the new representative role afforded to workplace delegates under the Act. The ACTU respectfully submits that the changes would better reflect the role of the Model Consultation Term in enterprise agreements and are supported by those objects of the FW Act going to the enablement of representation at work.[29]

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[28] Section 3 of the FW Act.
[29] Section 3(e).

Current Clause 16 (New Clause 22) – Definitions / Interpretation

The ACTU proposes several new definitions. Firstly that "employees" include the singular "employee". The proposal reflects the ACTU position that where a major change is likely to have a significant effect on a single employee, that employee should be consulted with. To obtain the benefit of the consultation, the change would already have had to meet the threshold of a "major change" and a "significant effect". It is respectfully submitted that should such a change and effect be shown, an individual employee should be entitled to be consulted.

Secondly, the ACTU proposes that employer includes the plural. This proposed change takes into account that more than one employer may be covered by an enterprise agreement.

Thirdly, the ACTU proposes that workplace delegate, which is elsewhere introduced as a term, be defined with specific reference to the new s.350C of the FW Act.

Proposed Changes to the Dispute Term

The ACTU proposes that the Fair Work Commission adopt a new Model Dispute Term, that differs in a number of respects from the current wording. Again, the proposed changes appear in the below, "marked-up", as against the current Model Dispute Term found in Schedule 6.1. to the FW Regulations. The ACTU's submission in support of each of the changes follows the marked-up proposed model term.

Model Dispute term

(1) If a dispute relates to:

(a) a matter arising under the agreement; ~~or~~

(b) the National Employment Standards; or

(c) any other matter that is capable of being agreed to in an enterprise agreement approved under the *Fair Work Act 2009*.

this term sets out procedures to settle the dispute.

(2) The parties to a dispute referred to in this procedure may include:

(a) An employee or employees covered by the agreement who are, or will be, affected by the dispute;

(b) The employer or employers covered by the agreement; and

(c) An employee organisation who is either:

(i) entitled to represent the industrial interests of an employee or employees referred to in (a); or

(ii) covered by the enterprise agreement and entitled to the benefit of, or has a role or responsibility with respect to the matter in dispute.

(3~~2~~) An employee who is a party to the dispute may appoint a representative for the purposes of the procedures in this term.

(4~~3~~) In the first instance, the parties to the dispute must try to resolve the dispute at the workplace level, by discussions between the relevant employee or employees, ~~and~~ relevant supervisors and/or management and any relevant employee organisation.

(5~~4~~) If discussions at the workplace level do not resolve the dispute, a party to the dispute may refer the matter to the Fair Work Commission.

(6) The FWC may consider a referral made under clause 4 even if the requirement for discussions in paragraph (4) and (5) has not been complied with if the FWC is satisfied that it is appropriate in all the circumstances to do so.

(75) The Fair Work Commission may deal with the dispute in 2 stages:

(a) the Fair Work Commission will first attempt to resolve the dispute as it considers appropriate, including by mediation, conciliation, expressing an opinion or making a recommendation; and

(b) if the Fair Work Commission is unable to resolve the dispute at the first stage, the Fair Work Commission may then:

(i) arbitrate the dispute; and

(ii) make a determination that is binding on the parties.

Note 1: If the Fair Work Commission arbitrates the dispute, it may also use the powers that are available to it under the Act, including, but not limited to, the power to grant interim relief.

Note 2: A decision that the Fair Work Commission makes when arbitrating a dispute is a decision for the purpose of Div 3 of Part 5.1 of the Act. Therefore, an appeal may be made against the decision.

(86) Subject to clause (9), wWhile the parties are trying to resolve the dispute using the procedures in this term:

(a) an employee must continue to perform his or her work as he or she would normally unless he or she has a reasonable concern about an imminent risk to his or her health or safety; and

(b) an employee must comply with a direction given by the employer to perform other available work at the same workplace, or at another workplace, unless:

(i) the work is not safe; or

(ii) applicable occupational health and safety legislation would not permit the work to be performed; or

(iii) the work is not appropriate for the employee to perform; or

(iv) there are other reasonable grounds for the employee to refuse to comply with the direction.

(9) While the parties are working to resolve a dispute as outlined in subclause (1)(a) or (b), they will maintain the status quo that existed before the event or circumstance that led to

the dispute. However, if maintaining the status quo would require performing work in a way that causes the employer or an employee to have a reasonable concern about an imminent risk to the employee's health or safety, this requirement does not apply.

(10~~7~~) The parties to the dispute agree to be bound by a decision made by the Fair Work Commission in accordance with this term.

NOTE: In addition to this clause, the Act contains dispute resolution procedures as follows:

For a dispute about rights under the Act to	Section
Request flexible working arrangements	65B
Change casual employment status	66M
Request an extension to unpaid parental leave	76B
Exercise an employee's right to disconnect	333N

Change to Subclause 1(c) – Expansion of Scope of Dispute Resolution – Best Practice

The ACTU proposes that subclause 1(c) be amended to provide for an expanded scope of the Model Dispute Term. The change would allow the parties to utilise the model procedure for a dispute over any matter capable of being dealt with in an enterprise agreement, that is, for any matter that is within the scope of s.172 of the FW Act, excluding any matters that may be unlawful as that term is used in s.194 of the FW Act.

Although the proposed change would take the Model Dispute Term beyond the scope required for a dispute settlement term to meet the requirements of s.186 of the FW Act, provided the Commission meets those requirements, the Model Terms need not be confined only to those matters.

The proposed change recognises that in practice disputes may arise between parties to an enterprise agreement that relate to matters that are not contemplated in the enterprise agreement nor contained in the NES. Allowing those matters to be dealt with by the mechanism in the model term would assist in having those matters resolved. The approach is consistent with the proactive approach to dispute resolution recommend by the FWO's "Effective Dispute Resolution Practice Guide" ("**the FWO's Dispute Best Practice Guide**") which says the following regarding "working at best practice" on page 3:

Working at best practice

Disputes and complaints can happen at any workplace. A dispute exists when one or more people disagree about something and the matter remains unresolved. Often disputes can be settled quickly and informally in the course of everyday work. However, if people can't agree on a way forward or if the dispute is about a serious matter, you might need a more formal approach. Best practice employers have simple, fair, confidential and transparent dispute resolution procedures in place. These employers take disputes seriously and address issues quickly and effectively, so they don't escalate. Every workplace can enjoy the benefits of taking a best practice approach to dispute resolution. These may include:

- *greater employee productivity through increased job satisfaction*
- *improved employee retention*
- *reduced stress for managers and employees*
- *better relationships with employees*
- *reducing the costs that come from resolving disputes externally (such as legal fees associated with dealing with claims made by employees against the employer).*

A copy of the **FWO IFA Best Practice Guide** is attached to these submission and marked "**A-4**".

New Clause 2 – Parties to the Dispute

The proposed new clause 2 seeks to describe the parties able to be a participant in the dispute in a manner that is consistent with the analysis of the majority of the Full Court in *Energy Australia Yallourn Pty Ltd v Automotive, Food, Metal, Engineering, Printing and Kindred Industries Union* [2018] FCAFC 146 (31 August 2018) from paragraph [58] to [80]. In particular, the proposed clause would put beyond doubt that an employee organisation entitled to represent an employee or an employee organisation covered by an enterprise agreement and with a right or responsibility under that agreement, is able to be a participant in a dispute under the Model Dispute Term. In addition to providing clarity on the face of the clause, the proposal is consistent with the object contained in s.3(e) of the FW Act, that is, "recognising the right to freedom of association and **the right to be represented**, protecting against unfair treatment and discrimination, **providing accessible and effective procedures to resolve grievances and disputes** and providing effective compliance mechanisms" [emphasis added].

Amendments to new Clause 4 – Consequential

The proposed amendments to what would become clause 4 of the Model Dispute Term are substantially consequential to those proposed above in relation to clause 2.

New Clause 6 – Commission Discretion

The proposed new clause 6 of the Model Dispute Term seeks to provide the Commission with power to waive a defect in the steps taken under the term which may otherwise affect the jurisdiction of the Commission, however, only "where it is appropriate in all the circumstances to do so". In practice, given the relatively straight forward structure of the Model Dispute Term, it may be that those circumstances are relatively confined. However, it is respectfully submitted that the term would nevertheless be a potentially useful one. Examples of where such a course may be appropriate include where a respondent party has refused or otherwise failed to try to resolve the dispute by having discussions at workplace level or where discussions are delayed such that the urgency and/or nature of the matter may lead to it being considered by the Commission appropriate to be dealt with taking into account the objects of the FW Act and its general function pursuant to s578 of the FW Act to consider equity, good conscience and the merits of the matter.

The proposal, in allowing for the waiving of technical objections, albeit it in limited circumstance, would further the object of the Act to provide "accessible and effective procedures to resolve grievances".[30]

Changes to Note – Interim Relief

The proposed change to the note under what is currently clause 5 would not introduce a substantive change however would better inform parties of the options available under the existing procedure.

New Clause 9 – Status Quo

The proposed new clause 9 seeks to introduce a status quo provision in relation to disputes that arise in relation to a term contained in the enterprise agreement or the NES. The Background Paper at paragraph [61] notes that one of the common differences observed between dispute resolution terms in enterprise agreements compared to the model dispute resolution term is by "including additional provisions around the performance of work whilst the dispute is being resolved, which are different to or in addition to the provisions in the model term". Example 2 in Appendix G contains such a provision, providing for the maintenance of the status quo. The

[30] Section 3(e).

ACTU's affiliates have identified status quo clauses as common in several important sectors of the Australian economy.

Status quo clauses have a number of practical benefits including:

(a) The encouragement of cooperation and negotiation at a workplace level on the basis that the parties understand that existing conditions will remain in place if the matter becomes a formal dispute.

(b) By ensuring that current practices remain substantially in place, a status quo clause provides greater workplace stability and helps prevent disputes escalating on the ground in a way that leads to higher levels of stress for both managers and employees and reduced levels of cooperation and productivity.

(c) The stability provided by a status quo clause, and the good faith it imbues, can be of assistance to the parties in coming together to settlement the dispute prior to the matter going to arbitration (if the dispute terms contains arbitration).

(d) A status quo clause, in preserving current terms and conditions, also reduces the incentive for parties to resolve matters urgently through expensive and adversarial legal enforcement action in the courts.

For the above reasons, the ACTU presses that the Model Dispute Term include a status quo clause.

Additional Note at End of Clause

The proposed new note at the end of the clause essentially replicates a similar note found at the bottom of the standard award disputes term, The note provides useful context and information related to the circumstances that may involve a dispute at the workplace.

Proposed Changes to the Model Dispute Term in Copied State Instruments

The current Model Dispute Term that applies to Copied State Instruments is in substantively similar terms to that of the Model Dispute Term. As copied state instruments are likely of a transitional nature, the ACTU proposes that it retains similarity to the Model Dispute Term and includes any changes adopted by the Commission in relation to that term.

The proposed changes appear in below, "marked-up", as against the current Model Dispute Term found in Schedule 6.1A to the FW Regulations.

Model term for dealing with disputes about matters arising under copied State instrument

Model term

(1) This term sets out procedures to settle a dispute about a matter arising under a copied State instrument and any other matter that is capable of being agreed to in an enterprise agreement approved under the *Fair Work Act 2009*.

(2) An employee who is a party to the dispute may appoint a representative for the purposes of the procedures in this term.

(3) The parties to a dispute referred to in this procedure may include:

(a) The employee covered by copied state instrument who is, or will be, affected by the dispute;

(b) The employer or employers covered by the copied state instrument; and

(c) An employee organisation who is either:

(iii) entitled to represent the industrial interests of an employee or employees referred to in (a); or

(iv) covered by the copied state instrument and entitled to the benefit of, or has a role or responsibility with respect to the matter in dispute.

(~~3~~4) In the first instance, the parties to the dispute must try to resolve the dispute at the workplace level, by discussions between the relevant employee ~~or employees~~, ~~and~~ relevant supervisors and/or management and any relevant employee organisation.

(~~4~~5) If discussions at the workplace level do not resolve the dispute, a party to the dispute may refer the matter to the Fair Work Commission.

(6) The FWC may consider a referral made under clause 5 even if the requirements for discussions in paragraphs (4) and (5) -have not been complied with, if the FWC is satisfied that it is appropriate in all the circumstances to do so.

(~~5~~7) The Fair Work Commission may deal with the dispute in 2 stages:

(a) the Fair Work Commission will first attempt to resolve the dispute as -it considers appropriate, including by mediation, conciliation, expressing an opinion or making a recommendation; and

(b) if the Fair Work Commission is unable to resolve the dispute at the first stage, the Fair Work Commission may then:

(i) arbitrate the dispute; and

(ii) make a determination that is binding on the parties.

Note 1: If the Fair Work Commission arbitrates the dispute, it may also use the powers that are available to it under the Act, including but not limited to the power to grant interim relief.

Note 2: A decision that the Fair Work Commission makes when arbitrating a dispute is a decision for the purpose of Division 3 of Part 5 - 1 of the Act. Therefore, an appeal may be made against the decision.

(~~6~~8) Subject to clause 9, w~~W~~hile the parties are trying to resolve the dispute using the procedures in this term:

(a) an employee must continue to perform his or her work as he or she would normally unless he or she has a reasonable concern about an imminent risk to his or her health or safety; and

(b) an employee must comply with a direction given by the employer to perform other available work at the same workplace, or at another workplace, unless:

(i) the work is not safe; or

(ii) applicable work health and safety legislation would not permit the work to be performed; or

(iii) the work is not appropriate for the employee to perform; or

(iv) there are other reasonable grounds for the employee to refuse to comply with the direction.

(9) While the parties are working to resolve a dispute under the copied state instrument, they will maintain the status quo that existed before the event or circumstance that led to the dispute. However, if maintaining the status quo would require performing work in a way that causes an employee to have a reasonable concern about an imminent risk to the employee's health or safety, this requirement does not apply.

(~~7~~10~~9~~) The parties to the dispute agree to be bound by a decision made by the Fair Work Commission in accordance with this term.

Note: In addition to this clause, the Act contains dispute resolution procedures as follows:

For a dispute about rights under the Act to	Section
Request flexible working arrangements	65B
Change casual employment status	66M
Request an extension to unpaid parental leave	76B
Exercise an employee's right to disconnect	333N

Conclusion

The Amending Act has made significant changes to how the Model Terms related to enterprise agreements and copied state instruments are required to be made under the FW Act as well as to the potential content of those Model Terms.

In recognition of the change, the ACTU proposes a range amendments to the current Model Terms be considered by the Fair Work Commission in these proceedings. For the reasons contained in these submissions, the ACTU urges the Commission to exercise the further powers it has been given as "Australia's expert and independent workplace relations tribunal"[31] to make compliant terms for consultation, flexibility, and dispute resolution that are relevant, up-to-date and support the right to just and favourable working conditions and collective bargaining.

[31] Revised Explanatory Memorandum to the *Fair Work Legislation Amendment (Closing Loopholes) Bill 2023* at [15]

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Attachments to ACTU Submissions – Model Terms

Submission by the Australian Council of Trade Unions to the Fair Work Commission
– 1 November 2024

ACTU
australian council of trade unions

Contents

Australian Government Fair Work OMBUDSMAN

Attachment A-1

Use of individual flexibility arrangements Best Practice Guide

Australian Government Fair Work OMBUDSMAN

Use of individual flexibility arrangements Best Practice Guide

This best practice guide is for managers and employers. It explains the advantages of taking a best practice approach to individual flexibility arrangements (IFAs). It includes:

- Working at best practice
- Individual flexibility arrangements
- Legal requirements
- Using best practice to support IFAs in your workplace
- A best practice checklist
- Where to get more information.

It also has practical tips and case studies to help you move your business towards best practice.

Working at best practice

Best practice employers understand the legal requirements and have proper processes in place for making IFAs. They also communicate openly with their employees about the availability and effect of IFAs.

Every workplace can enjoy the benefits of taking a best practice approach to IFAs. These may include:

- greater flexibility in the workplace
- certainty, simplicity and clarity around conditions of employment
- attracting and retaining skilled and valuable staff
- improving job satisfaction and productivity.

Individual flexibility arrangements

An IFA is a written agreement made with an individual employee to change the effect of certain terms in the employee's award or registered agreement. It is used to make alternative arrangements to meet the needs of the employer and the individual employee.

However, an IFA can't be used to reduce or remove an employee's entitlements and must leave an employee better off overall when compared to their award or registered agreement. There's also a limit to what terms and conditions an IFA can change.

PRACTICAL TIP: You may have heard the term 'flexible working arrangements' – this is a different kind of workplace flexibility that doesn't affect award or agreement terms. Certain employees have a right to request flexible working arrangements. For more information, see our Flexible working arrangements best practice guide available at fairwork.gov.au/bestpracticeguides or complete our free Workplace flexibility online course at fairwork.gov.au/learning

All awards and registered agreements must include a clause about individual flexibility.

If the employee works under an award, you can use an IFA to vary:

- arrangements for when work is done, such as work hours
- overtime rates
- penalty rates
- allowances
- leave loading.

If the employee works under a registered agreement, you'll need to check the flexibility term in the registered agreement to see if the proposed change is allowed. If the registered agreement doesn't have a flexibility clause, the model clause from the Fair Work Regulations automatically applies.

CASE STUDY – flexibility

Fiona works for Mike. Her workplace is covered by an award that says ordinary hours are worked between 9am to 5pm.

The flexibility term in the award says that the employer and employee can agree to vary terms about when the work is performed.

Fiona wants to start and leave work early to attend afternoon classes for a course she wants to begin. She approaches Mike about this.

They discuss options and agree that Fiona can work her ordinary hours between 7am and 3pm. Mike and Fiona record this arrangement as an IFA.

The ordinary hours of work for the other employees will still be 9am to 5pm.

Legal requirements

Genuine agreement

An employer and employee must genuinely agree to an IFA. Employees can't be forced to make an IFA, and they can't be treated adversely or discriminated against for refusing to enter an IFA.

You can't make an IFA a condition of employment when hiring new employees.

Formal requirements

An IFA must:

- be in writing, and signed by you and the employee. If the employee is under 18 years of age, it must also be signed by their parent or guardian
- identify the terms of the award or registered agreement which the IFA will vary
- set out how the arrangement may be terminated by either the employee or the employer.

You must keep the signed IFA in the employee's employment file and give a copy to the employee.

Better off overall test

When making an IFA, the employer is responsible for ensuring their employee will be better off overall.

The better off overall test involves weighing up the advantages and disadvantages of the IFA to the employee. You should compare the employee's entitlements under the proposed IFA against their entitlements under their award or registered agreement.

When deciding if the employee is better off overall you should consider the following questions:

- Who initiated the request?
- What entitlements are being changed? (For example, hours, overtime, penalty rates, etc.)
- What is the value of these entitlements under the award or registered agreement?
- Does changing the employee's span of hours change their penalty rates?
- Is the employee better off financially? (For example, will they receive more on a flat rate of pay under the IFA than they would as separate entitlements under their award or registered agreement?)
- Are there any situations where the employee wouldn't be financially better off? (such as a roster cycle or after a certain amount of overtime.)
- Are there any other circumstances or characteristics unique to the employee that should be considered? (For example, factors such as the employee's family commitments, their health, whether they have a second job, study or other interests.)

Frequently asked questions

Does an IFA replace the award or registered agreement?

No. An IFA applies as if it were a term of the employee's award or registered agreement. The other terms and conditions of their award or registered agreement not covered by the IFA will still apply.

Can I make an IFA which covers a group of employees?

No. An IFA is an agreement with an individual. You'd need to have a separate IFA with each employee in the group, making sure that each individual consents, and is better off overall when compared to their award or registered agreement.

Can I make an IFA a condition of employment for new employees?

No. You cannot make an offer of employment conditional on entering an IFA and the employee must genuinely agree to it. Employees also have workplace protections in relation to making and terminating IFAs.

What happens if an IFA doesn't meet all the formal requirements or the employee isn't better off overall?

It still operates as an IFA. This ensures that employees keep any benefits to which they are entitled to under the IFA. However, an employee can terminate an IFA if they believe they are being disadvantaged. The employee may be able to take action for compensation and penalties in that case. The employer may also face penalties for not meeting all the legal requirements for making an IFA, as this is a breach the flexibility clause in their award or registered agreement.

Using best practice to support IFAs in the workplace

Best practice doesn't look the same for all employers. The way to achieve best practice will vary because of things like the number of employees, industry and the business environment.

Below are initiatives and suggestions that can help you move your business towards best practice.

Develop a policy

Developing an IFA policy shows that your business values flexibility and is open to meeting the needs of individual employees. A policy can also help your managers and employees understand how IFAs work and give your business an advantage to attract and retain staff. When developing your IFA policy, consider both the legal requirements and the needs of your business. This will help ensure a consistent and fair approach that works for both you and your employees.

Your IFA policy should:

- explain what terms and conditions can be altered by an IFA
- detail the process for requesting and negotiating an IFA
- set expectations and considerations when negotiating an IFA (for example, the needs of the business, the employee's individual circumstances and the better off overall test)
- encourage managers and employees to consider a range of options to address individual circumstances
- complement other flexibility policies and help employees achieve genuine work-life balance
- include information about how and when IFAs will be reviewed
- detail how and when IFAs may be terminated.

PRACTICAL TIP: A useful way to provide guidance for your managers and employees is to include a question and answer section at the end of your policy.

Train managers and employees

Best practice employers give their managers and employees training about how IFAs can be used in their business. Educating staff will help build an understanding of the options available under an IFA.

As a minimum, any training should cover the requirements in the Fair Work Act and the relevant award or registered agreement. It should also include information about the form, content and operation of IFAs.

The Fair Work Ombudsman has information you can provide your managers to help them understand IFAs. Visit fairwork.gov.au/individual-flexibility-agreements

Meet to discuss options

IFAs are intended to be beneficial for both the employee and employer. Best practice employers meet with their employees to discuss individual circumstances that meet the needs of both the business and the employee. That means you both must understand what each other's needs are so you can reach a genuine agreement.

As part of these discussions, consider giving employees information that will help them understand your business. This might include patterns of customer traffic, business performance trends, details of upcoming work or information about projects and staffing needs. However, you don't need to provide confidential or commercially sensitive information about your business.

When meeting with an employee to discuss an IFA, it's best to:

- organise a mutually convenient time and place. Choose somewhere that is private with minimal distractions, and allow enough time to have a meaningful discussion
- start by having both parties explain their interests and needs. Why is the IFA wanted?
- work together to think of different options that could meet both parties' needs, and consider all options
- share relevant information. For example, if an employee is asking to work a different span of hours, you could share information about operating times, customer needs and applicable penalty rates
- explain to the employee how the proposed IFA would work and consider if they are better off overall
- answer any questions and give the employee time to think about the proposed IFA
- encourage the employee to seek advice or discuss the proposed IFA with a support person if they wish
- schedule further meetings as necessary if further time is needed to consider the available options.

Help your employee understand

It's your responsibility to make sure your employee genuinely agrees to an IFA.

You can help your employee understand how the proposed IFA will work by:

- taking time to explain the factors you've considered in your better off overall assessment
- creating a mock pay slip so your employee can compare what they'll get under the IFA and what they're currently receiving
- giving them any calculations you have prepared
- including a trial or review period within the IFA.

Employers should look for, and address, factors which could affect an employee's understanding of an IFA. This might include their level of education, age, level of experience, knowledge of English or any cultural differences.

If you have concerns about an employee's understanding, consider:

- inviting the employee to bring a support person to discussions to help explain the terms and effects of the IFA
- arranging for an interpreter to attend discussions
- translating a copy of the proposed IFA and the award or registered agreement clause it would vary.

CASE STUDY – Employer initiated IFA

Jack runs a small landscaping business. His 3 full-time employees are covered by the Gardening and Landscaping Services Award (Award) and work varying additional hours each week. These additional hours attract different overtime rates under the Award (150% of the ordinary rate for the first 2 hours of overtime and 200% after that).

Jack would like to simplify his payroll by paying his employees a flat hourly rate of pay.

He checks the individual flexibility arrangements clause in the award to find out how to initiate an IFA. He also confirms the Award doesn't have rules about annualised wage arrangements.

Jack approaches each of the employees separately to discuss the proposed IFAs. He explains that they will still be paid for each hour worked, but all hours will be paid at the same flat hourly rate, which is higher than the ordinary rate, to compensate for the overtime rates which they would no longer receive.

Jack gives each employee a written proposal and a copy of his calculations that show they won't be paid less under the proposed IFA. Jack asks the employees to consider the proposed IFA and the calculations he has given them and organises another meeting for the following week.

After considering the information, each of the employees agrees to the change. Jack records the agreement he reaches with each employee in separate IFAs.

Consider different approaches and options

As a best practice employer, you should be open to, and genuinely consider, workable options suggested by your employees.

It's possible an employee will suggest an arrangement that hasn't previously been used in your business. Consider all suggestions as they may be practical and mutually beneficial.

Regular reviews

Over time, an IFA might no longer be practical or appropriate for you or your employee. This may be because the employee's needs or the requirements of the business have changed. Alternatively, it may be because entitlements under their award or registered agreement have changed.

It is therefore important that you review IFAs regularly (at least annually) to ensure the entitlements of the employee under the IFA don't fall below their award or registered agreement. This is important when circumstances change, for example when:

- an employee is promoted to a new classification
- a junior employee has a birthday
- the pay rates under awards are reviewed (this occurs annually in July)
- wage increases take effect under a registered agreement.

Best practice employers will schedule regular discussions with an employee to make sure their IFA is operating in a way that meets everyone's needs. Depending on the nature of the IFA, these meetings may be monthly, bi-annually, annually or as needed.

Terminating an IFA

The needs of your business and employee may change meaning an IFA is no longer suitable. If this occurs, discuss the issue with your employee and look for alternative arrangements.

If an alternative arrangement is proposed:

- explain how the new arrangement would work
- give the employee time to think about the new arrangement
- record any variation in writing and make sure it otherwise complies with the requirements for making an IFA
- keep the variation on file and give a copy to the employee.

If you can't agree on a suitable alternative arrangement, the IFA can be terminated.

If you and the employee agree to terminate the IFA, discuss if measures need to be put in place before the termination will take effect (for example, changing rosters or arranging childcare) and the agreed date the IFA will end.

If one party won't agree to terminate an IFA when requested, the other party can terminate it by providing notice. An IFA made under an award requires the party terminating it to provide the other party 13 weeks written notice. An IFA made under a registered agreement requires the amount of notice stated in the registered agreement (which can't be longer than 28 days).

IFAs made under an award prior to 4 December 2013 can be ended with 28 days' notice.

A copy of the termination notice must be kept as part of your employment records.

Best practice checklist

A best practice workplace involves more than just understanding and complying with the law. This checklist will help you work towards best practice when using IFAs in your business:

- ☐ **award or registered agreement** – look at the flexibility term of your award or registered agreement to check what terms can be varied
- ☐ **policy** – develop an IFA policy that suits your business – this will help ensure a consistent and fair approach for all employees
- ☐ **requests** – let employees know they can request an IFA and how to do it. Let managers know how to respond to a request and how to record an IFA
- ☐ **discuss** – when an IFA is proposed, meet with the employee to discuss both of your needs. At this meeting:
  - genuinely consider any ideas raised by the employee and answer their questions
  - work with them to come up with options. If needed, take time to consider arrangement(s)
  - make sure these options pass the better off overall test
  - explain the effect of the proposed IFA to the employee
  - encourage them to take some time to consider the proposed IFA, discuss it with a support person and seek advice
  - set up another meeting to further discuss the proposed IFA
- ☐ **understanding** – help the employee understand a proposed IFA. Take appropriate steps to assist the employee for example, offering a support person or translator if appropriate
- ☐ **review** – schedule an IFA review date with your employee. Review the IFA against the award or registered agreement every year to ensure it meets the better off overall test.

Where to get more information

- Learn more about IFAs and other types of flexibility at our Flexibility in the workplace page at fairwork.gov.au/flexibility
- Access our free online training for employers and managers. Available courses cover best practice approaches to difficult conversations in the workplace, hiring employees, managing employees, managing performance, diversity and discrimination, workplace flexibility and record- keeping and pay slips. Complete our free online courses at fairwork.gov.au/learning
- Your can use our easy-to-follow and practical guides will help you transform your business from compliant to best practice, so you can get the most out of your employees. Find all our Best practice guides at fairwork.gov.au/bestpracticeguides

CONTACT US

Fair Work online: www.fairwork.gov.au

Fair Work Infoline: **13 13 94**

Need language help?

Contact the Translating and Interpreting Service (TIS) on **13 14 50**

Hearing & speech assistance

Call through the National Relay Service (NRS):

For TTY: **13 36 77**
Ask for the Fair Work Infoline **13 13 94**

Speak & Listen: **1300 555 727**
Ask for the Fair Work Infoline **13 13 94**

The Fair Work Ombudsman is committed to providing you with advice that you can rely on. The information contained in this fact sheet is general in nature. If you are unsure about how it applies to your situation you can call our Infoline on 13 13 94 or speak with a union, industry association or a workplace relations professional.

Last updated: January 2024
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Attachment A-2

Australian Government

Workplace Gender Equality Agency

Reporting Questionnaire

Word version 2023-24

Please note:

- This word document is for preparing responses offline to refer to when completing the Questionnaire, this word document cannot be uploaded into the WGEA employer portal
- Voluntary questions and responses are highlighted.
- If you are reporting in the same submission group as 2022-23, most of your answers will pre-populate when completing the module. Review your prior responses in the Portal from 1 Apil to ensure all pre-populated answers are still accurate. Provide a response, where applicable, to those questions that do not have pre-populated answers.

Workplace overview

Policies and strategies

Policies *are the guidelines, rules and procedures developed by an organisation to govern its actions (often in recurring situations). They define the limits (dos and don'ts) within which decisions must be made. They are widely communicated and available to all staff.*

A ***strategy*** *is a plan of action designed to achieve one or more of an organisation's objectives. Strategies fill the gap between "where we are" and "where we want to be", that is, "how are we going to get there?" They relate to how an organisation allocates and uses materials and human resources and require an executive decision.*

A formal policy/strategy is a written document approved by human resources or management. A strategy can exist without a policy and a policy without a strategy. However, both can coexist and support each other.

1.1 Do you have formal policies and/or formal strategies in place that support gender equality in the workplace?

This question asks whether your organisation has 'policies' and/or 'strategies' in place that support gender equality in the workplace and what the policies and/or strategies include. These areas are considered key to achieving gender diversity in the composition of your workforce. If you do not have a policy and/or strategy in place, you will have the opportunity to indicate why.

(Select all that apply)

☐ Yes *(Move on to question 1.1a)*

☐ No *(Move on to question 1.2)*

- ☐ Currently under development *(Enter estimated completion date: DD/MM/YYYY)*
- ☐ Other (provide details) _____

1.1a Do the formal policies and/or formal strategies include any of the following?

(Select all that apply)

☐ Recruitment

☐ Retention

☐ Performance management processes

☐ Promotions

☐ Talent identification/identification of high potentials

☐ Succession planning

☐ Training and development

☐ Key performance indicators for managers relating to gender equality

☐ Gender and other aspects of diversity

☐ Other

1.2 Does your organisation have any targets to address gender equality in your workplace?

A target is an achievable, time-framed goal that an organisation can set to focus its efforts. A gender balance target is a goal for a specific group of people.

☐ Yes *(Select all that apply)*

- ☐ Reduce the organisation-wide gender pay gap
- ☐ Increase the number of women in management positions
- ☐ Increase the number of women in key management personnel (KMP) roles
- ☐ Increase the number of women in male-dominated roles
- ☐ Increase the number of men in female-dominated roles
- ☐ Increase the number of men taking parental leave
- ☐ Increase the number of men utilising flexible work arrangements
- ☐ To have a gender balanced governing body (at least 40% men and 40% women)
- ☐ Other

☐ No

1.3 Voluntary response: If your organisation would like to provide additional information relating to your gender equality policies and strategies, please do so below.

(500 word limit)

Governing bodies

Governing bodies are the group of people who formulate policy and direct the affairs of an institution in partnership with the managers. The core role of a governing body is the governance of an organisation. Governing bodies:

- *include voluntary boards of not-for-profit organisations*
- *are not a diversity council or committee*
- *are not a global diversity and inclusion team.*

Some organisations have common types of governing bodies. For:

- *private or publicly listed companies – the governing body is one or more directors or a board of directors*
- *trusts – the governing body is the trustee*
- *partnerships – the governing body will be all or some partners (if they are elected)*
- *religious structures – the governing body is a canonical advisor, bishop or archbishop*
- *any other structure – the governing body is the management committee.*

If you share a governing body with your parent organisation, then your governing body is the same as your parent's.

1.4 Identify your organisation/s' names and indicate if they have a governing body

You are required to provide details of each organisation's governing body. A governing body is defined as the one that has primary responsibility for the organisation's governance. As such, you must only report one governing body for each ABN covered in this report. Please note:

- *A list of organisation/s that were confirmed for this submission will display*
- *You must check the organisation/s this governing body relates to.*
- *If there are multiple organisations covered in this report you must tick all that relate to this particular governing body.*
- *If this governing body does not cover all organisations, you should add another governing body after saving this one.*
- *You can only provide one governing body response for each ABN reported in this submission, copy questions A-H below for each governing body being reported.*

Organisation name:

A. To your knowledge, is this governing body also reported in a different submission group for 2023-24 Gender Equality Reporting?

☐ Yes

☐ No

B. What is the name of your governing body?

Indicate the full name of your governing body as it is known internally and/or externally.

C. What type of governing body does this organisation have?

*The type of governing body should be the one that has **primary** responsibility for the governance of each organisation.*

(Select one option)

☐ Board of directors
☐ Board/committee of partners
☐ Board of Trustees
☐ Council
☐ Management committee
☐ Other governing body/authority (provide details)

D. How many members are in the governing body and who holds the predominant Chair position?

A Chair is the person who leads and chairs meetings of the governing body. In the situation of rotating Chair position for the meetings, the predominant gender of the people acting as Chairs for the meeting during the reporting period should be used.

'X' is a voluntary option to cover members who do not identify as either male or female as defined in the reporting guide.

	Female	**Male**	**X**
Chairs	*e.g.1*	*e.g.0*	*e.g. 0*
Members (excluding chairs)	*e.g. 6*	*e.g. 5*	*e.g. 1*

E. Do you have formal policies and/or formal strategies in place to support and achieve gender equality in this organisation's governing body?

(Select one option)

☐ Yes *(Move to question E.1)*

If you select yes, you must indicate which you have.

- ☐ Policy
- ☐ Strategy

☐ No *(Select all that apply and move to question F)*

- ☐ Currently under development *(Enter estimated completion date: DD/MM/YYYY)*
- ☐ Do not have control over governing body/appointments
- ☐ Other (provide details)

E.1 Do the formal policies and/or formal strategies include any of the following?

(Select all that apply)

- ☐ Selection process for governing body members
- ☐ Broad advertisement of governing body positions
- ☐ Gender diversity on candidate shortlists
- ☐ Succession planning for the governing body
- ☐ Gender and other aspects of diversity

F. Does this organisation's governing body have limits on the terms of its Chair and/or Members?

For the responses below, if the term limit does not relate to a full year, record the part year as a decimal amount.

☐ Yes *(Select all that apply)*

For the Chair *(Enter maximum length of term [in years])*

For the Members *(Enter maximum length of term [in years])*

☐ No

G. Has a target been set to increase the representation of women on this governing body?

A target is an achievable, time-framed goal that an organisation can set to focus its efforts. A gender balance target is a goal for a specific group of people, in this case the governing body or board. Targets are different from quotas in that they are set by an organisation to suit their own results and timeframes. Quotas are set by an external body with the authority to impose them.

(Select one option)

☐ Yes *(Provide more detail below in Questions G.1 & G.2)*

☐ No *(Select all that apply)*

☐ Currently under development *(Enter estimated completion date: DD/MM/YYYY)*

☐ Other (provide details)

G.1 What is the percentage (%) target?

G.2 What year is the target to be reached (select the last day of the target year)?

Click or tap to enter a date.

H. *Voluntary question*: Do you have a formal policy and/or formal strategy on diversity and inclusion for this organisation's governing body?

Gender inequality is not experienced in the same way by all women, men and non-binary people. Different dimensions of identity, including race, sexual orientation, disability, and age, can intersect and influence individual experiences and outcomes at work. These questions focus on diversity within the organisation's governing body. A formal policy and/or formal strategy on diversity and inclusion for the organisation's governing body does not have to be a separate policy/strategy but could be a part of another policy/strategy, such as an overall gender equality policy and/or strategy or overall diversity and inclusion policy and/or strategy.

☐ Yes *(Select all that apply)*

☐ Aboriginal and/or Torres Strait Islander identity

☐ Cultural and/or language and/or race/ethnicity background

☐ Disability and/or accessibility

☐ Gender identity

☐ Age

☐ Other

☐ No *(Select all that apply)*

☐ Currently under development *(Enter estimated completion date: DD/MM/YYYY)*

☐ Other (provide details)

I. *Voluntary question*: Do you collect data on any of the following dimensions of the identities of members of this organisation's governing body?

☐ Yes, Aboriginal and/or Torres Strait Islander identity	This data: ☐ cannot be shared publicly or internally by the employer ☐ can be shared publicly or internally by the employer
☐ Yes, Cultural and/or language and/or race/ethnicity background	This data: ☐ cannot be shared publicly or internally by the employer ☐ can be shared publicly or internally by the employer
☐ Yes, Disability and/or accessibility	This data: ☐ cannot be shared publicly or internally by the employer ☐ can be shared publicly or internally by the employer
☐ Yes, Gender identity	This data: ☐ cannot be shared publicly or internally by the employer ☐ can be shared publicly or internally by the employer

1.5 Voluntary response: If your organisation would like to provide additional information relating to governing bodies and gender equality in your workplace, do so below.

(500 word limit)

Action on gender equality

Gender pay gaps

Gender Pay Equity is when women and men receive equal pay for work of the same or similar value, however, it is not just about ensuring women and men performing the same role are paid the same but also about ensuring women and men performing different work of equal and comparable value are paid equitably. This is a legal requirement in Australia.

The gender pay gap is not to be confused with gender pay equity. The gender pay gap is the difference in average or median earnings between women and men and is usually a consequence of disadvantages employees face in the workplace. Gender pay gaps are also not a direct comparison of like roles.

Gender pay gaps are a useful way to monitor the different earning capacities of women and men across organisations, industries, and the workforce as a whole.

Employers need to be actively working to understand and address their pay equity and gender pay gaps. The first step in improving your organisation's pay equality and gender pay gap is to conduct your own pay gap analysis and understand what's driving any differentials.

2.1 Do you have formal policies and/or formal strategies on equal remuneration (pay equity and the gender pay gap) between women and men?

This question focuses on the policies and/or strategies your organisation has in place related to equal remuneration (pay equity and the gender pay gap) between women and men. If you do not have policies and/or strategies in place, you will have the opportunity to indicate why. The policies or strategies may be stand alone and/or contained within another strategy/policy.

(Select one option)

☐ Yes *(Select all that apply and move to question 2.1a)*

- ☐ Policy
- ☐ Strategy

☐ No *(Select all that apply then move to question 2.2)*

- ☐ Currently under development *(Enter estimated completion date: DD/MM/YYYY)*
- ☐ Other (provide details) [ ]

2.1a Do the formal policies and/or formal strategies include any of the following?

(Select all that apply)

- ☐ To achieve gender pay equity

☐ To close the gender pay gap

☐ To ensure no gender bias occurs at any point in the remuneration review process (for example at commencement, at annual salary reviews, out-of-cycle pay reviews, and performance reviews)

☐ To be transparent about pay scales and/or salary bands

☐ To ensure managers are held accountable for pay equity outcomes

☐ To implement and/or maintain a transparent and rigorous performance assessment process

☐ Other (provide details)

2.2 Have you analysed your payroll to determine if there are any remuneration gaps between women and men (e.g. conducted a gender pay gap analysis)?

This question focuses on the actions your organisation has taken in relation to gender remuneration. Specifically, it asks if and when you have conducted a remuneration gap analysis and if so, whether you took any actions as a result. If you have not taken any action, you will have the opportunity to indicate why.

(Select one option)

☐ Yes *(Move through questions 2.2a to 2.2c)*

☐ No *(Select all that apply below and move to question 2.3)*

☐ Currently under development *(Enter estimated completion date: DD/MM/YYYY)*

☐ Other (provide details)

2.2a What type of gender remuneration gap analysis has been undertaken?

(Select all that apply)

☐ A like-for-like gap analysis which compares the same or similar roles of equal or comparable value

☐ A by-level gap analysis which compares the difference between women's and men's average pay within the same employee category

☐ An overall gender pay gap analysis which compares the difference between women's and men's average pay across the whole organisation

2.2b When was the most recent gender remuneration gap analysis undertaken?

(Select one option)

☐ Within the last 12 months

☐ Within the last 1–2 years

☐ More than 2 years ago but less than 4 years ago

☐ Other (provide details)

2.2c Did you take any actions as a result of your gender remuneration gap analysis?

(Select one option)

☐ Yes *(Select all that apply)*

- ☐ Created a pay equity strategy or action plan
- ☐ Identified cause/s of the gaps
- ☐ Reviewed remuneration decision-making processes
- ☐ Analysed commencement salaries by gender to ensure there are no pay gaps
- ☐ Analysed performance pay to ensure there is no gender bias (including unconscious bias)
- ☐ Analysed performance ratings to ensure there is no gender bias (including unconscious bias)
- ☐ Set targets to reduce any gap pay gaps
- ☐ Reported pay equity metrics (including gender pay gaps) to the governing body
- ☐ Reported pay equity metrics (including gender pay gaps) to the executive
- ☐ Reported pay equity metrics (including gender pay gaps) to all employees
- ☐ Reported pay equity metrics (including gender pay gaps) externally
- ☐ Trained people-managers in addressing gender bias (including unconscious bias)
- ☐ Corrected instances of unequal pay
- ☐ Conducted a gender-based job evaluation process
- ☐ Implemented other changes (provide details):

☐ No *(Select all that apply)*

- ☐ Currently under development
- ☐ Other (provide details)

Voluntary response: You may also provide more detail below on the gender remuneration gap analysis that was undertaken.

(500 word limit)

2.3. Voluntary response: If your organisation would like to provide additional information relating to employer action on pay equity and/or gender pay gaps in your workplace, please do so below.

(500 word limit)

Employee consultation

2.4. Have you consulted with employees on issues concerning gender equality in your workplace during the reporting period?

Employee consultation is a formalised way to collect information about your employees' views on the workplace, what is working well and what could be improved. This question asks if you have consulted your employees about gender equality issues in the workplace during the reporting period.

Examples of issues can include:

- *parental leave entitlements and related processes, like keep-in-touch and return-to-work programs*
- *flexible working arrangements*
- *gender pay equity*
- *representation of women in management*
- *recruitment of women in non-traditional areas*
- *sexual harassment or discrimination.*

(Select one option)

☐ Yes *(Move questions 2.4a and 2.4b)*

☐ No *(Select all that apply below and then move to question 2.5)*

☐ Currently under development *(Enter estimated completion date: DD/MM/YYYY)*

☐ Other (provide details)

2.4a How did you consult employees?

(Select all that apply)

☐ Employee experience survey
☐ Consultative committee or group
☐ Focus groups
☐ Exit interviews
☐ Performance discussions
☐ Other (provide details)

2.4b Who did you consult?

(Select one of the top three selections or any combination of the bottom six options)

☐ ALL staff
☐ Women only

☐ Men only

☐ Human resources managers
☐ Management
☐ Employee representative group(s)
☐ Diversity committee or equivalent
☐ Women and men who have resigned while on parental leave
☐ Other (provide details)

2.5 Do you have formal policies and/or formal strategies in place to ensure employees are consulted and have input on issues concerning gender equality in the workplace?

(Select one option)

☐ Yes *(Select all that apply)*

- ☐ Policy
- ☐ Strategy

☐ No *(Select all that apply)*

- ☐ Currently under development *(Enter estimated completion date: DD/MM/YYYY)*
- ☐ Other (provide details)

2.6. Did your organisation/s share last year's public report/s with employees and shareholders?

It is a requirement within the WGE Act for the relevant employer to:

- *make public reports accessible to employees and shareholders*
- *inform employee organisations about the opportunity to comment*
- *inform employee organisations of lodgement of public report.*

Only select 'Not applicable' if your organisation/s did not submit a report in the previous reporting period.

☐ Yes
☐ No
☐ Not applicable

2.7. Have you shared previous Executive Summary and Industry Benchmark reports with the governing body?

It is a requirement within the WGE Act for the CEO to share your Executive Summary and Industry Benchmark Report. Only select 'Not applicable' if you did not receive an Executive Summary and Industry Benchmark from the Agency last year.

☐ Yes

☐ No

☐ Not applicable

2.8. Voluntary response: If your organisation would like to provide additional information relating to employee consultation on gender equality in your workplace, please do so below.

(500 word limit)

Flexible Work

Flexible working

This section focuses on the flexible work arrangements available in your organisation. If you have a formal policy and/or formal strategy on flexible work arrangements, it asks you to specify what this includes. It also asks whether specific flexible working options are available to managers and non-managers in your workplace, and whether these differ for women and men.

- *A flexible work arrangement is an agreement between a workplace and an employee to change the standard working arrangement to better accommodate an employee's commitments out of work.*
- *Flexible working arrangements usually encompass changes to the hours, pattern and location of work.*
- *If flexible working arrangements are not available to your employees, you will have the opportunity to indicate why.*

3.1 Do you have a formal policy and/or formal strategy on flexible working arrangements?

(Select one option)

☐ Yes *(Select from the options below then move to question 3.1a)*

☐ Policy

☐ Strategy

☐ No *(Select from the options below then move to question 3.2)*

☐ Currently under development *(Enter estimated completion date: DD/MM/YYYY)*

☐ Other (provide details) [ ]

3.1a Do the formal policies and/or formal strategies include any of the following?

(Select all that apply)

☐ A business case for flexibility has been established and endorsed at the leadership level

☐ Leaders are visible role models of flexible working

☐ Flexible working is promoted throughout the organisation

☐ Targets have been set for engagement in flexible work

☐ Targets have been set for men's engagement in flexible work

☐ Leaders are held accountable for improving workplace flexibility

☐ Manager training on flexible working and remote/hybrid teams is provided throughout the organisation

☐ Employee training on flexible working and remote/hybrid teams is provided throughout the organisation
☐ Team-based training on flexible working is provided throughout the organisation
☐ Employees are surveyed on whether they have sufficient flexibility
☐ The organisation's approach to flexibility is integrated into client conversations
☐ The impact of flexibility is evaluated (e.g. reduced absenteeism, increased employee engagement)
☐ Metrics on the use of, and/or the impact of, flexibility measures are reported to key management personnel
☐ Metrics on the use of, and/or the impact of, flexibility measures are reported to the governing body
☐ Flexible work offerings are available to all employees, with a default approval bias (all roles flex approach)
☐ Management positions are designed as part-time
☐ All team meetings are offered online
☐ Managers receive support to conduct performance evaluations that are not influenced by the work location of the employee (proximity bias)
☐ The ability to job-share is incorporated into job design and advertising of new roles
☐ Other (provide details)

3.2 Do you offer any of the following flexible working options to MANAGERS and/or NON-MANAGERS in your workplace?

Flexible working option	MANAGERS Formal options available	MANAGERS Informal options available	NON-MANAGERS Formal options available	NON-MANAGERS Informal options available	No
Flexible hours of work	☐	☐	☐	☐	☐
Compressed working weeks	☐	☐	☐	☐	☐
Time-in-lieu	☐	☐	☐	☐	☐
Remote working/working from home	☐	☐	☐	☐	☐
Part-time work	☐	☐	☐	☐	☐
Job sharing	☐	☐	☐	☐	☐

Purchased leave	☐	☐	☐	☐	☐
Unpaid leave	☐	☐	☐	☐	☐

3.3 Managers receive appropriate support to conduct performance evaluations that are not influenced by the work location of the employee.

Training, guides and standard evaluation processes are some examples of support that can be provided by employers to mitigate proximity bias, or the favouring of on-site workers, by managers.

☐ **Yes**
☐ **No**

3.4 Voluntary response: If your organisation would like to provide additional information relating to flexible working and gender equality in your workplace, please do so below.

(500 word limit)

Employee support

Paid parental leave

Parental leave policies are designed to support and protect working parents around the time of childbirth or adoption of a child and when children are young. This section focuses on whether employer-funded paid parental leave is available to carers in your organisation (in addition to government-funded parental leave), and if it is, which employees have access to it and how much leave is available.

Some workplaces have developed parental leave policies that no longer use the primary/secondary carer definition and provide equal entitlements to any eligible employee.

***Equally shared parental leave policies** offer the same type, length and conditions to employees of all genders, who require parental leave, with no distinction between primary and secondary carers.*

- *If your organisation offers this - you should answer this question with 'yes, we offer employer- funded parental leave to all genders without using the primary/secondary carer definitions.*

*A **primary carer** is the person who most meets the child's need, including feeding, dressing bathing and otherwise supervising the child.*

*A **secondary carer** is generally the current partner of the primary carer, the other legal parent of the child or the current partner of the other legal parent of the child.*

- *If your organisation provides parental leave based on this/these definition/s – you should answer this question with 'yes, we offer employer funded parental leave (using the primary/secondary carer definitions)'. If your organisation specifically provides maternity leave and/or paternity leave, you should also answer 'yes, we offer employer funded parental leave (using the primary/secondary carer definitions)'.*

*Through the **government's paid parental leave** (PPL) scheme, eligible employees receive up to 18 weeks' pay at the national minimum wage. This paid parental leave is **not** the equivalent to employer-funded paid parental leave.*

4.1 Do you provide employer-funded paid parental leave in addition to any government-funded parental leave scheme?

If you do not offer any employer-funded parental leave (in addition to any government funded parental leave scheme) – you should answer 'no, we do not offer employer funded parental leave'.

☐ Yes, we offer employer-funded parental leave to all genders without using the primary/secondary carer definitions (as defined above)
(Answer questions 4.1.1a – 4.1.1g and then move to question 4.2)

☐ Yes, we offer employer-funded parental leave using the primary/secondary carer definitions
(Answer questions 4.1.2b – 4.1.2c and then move to question 2)

☐ No, we do not offer employer-funded parental **leave**
(Select all that apply and then move to question 2)

☐ Currently under development *(Enter estimated completion date: DD/MM/YYYY)*

☐ Other (provide details)

4.1.1a Please indicate whether your employer-funded paid parental leave covers:

***Note** – this question is if you offer parental leave to all genders without using the primary/secondary definition.*

(Select all that apply)

☐ Birth

☐ Adoption

☐ Surrogacy

☐ Stillbirth

4.1.1b How do you pay employer-funded paid parental leave?

***Note** – this question is if you offer parental leave to all genders without using the primary/secondary definition.*

(Select one option)

☐ Paying the employee's full salary

☐ Paying the gap between the employee's salary and the government's paid parental leave scheme

☐ As a lump sum payment

4.1.1c Do you pay superannuation contribution to your carers while they are on parental leave?

***Note** – this question is if you offer parental leave to all genders without using the primary/secondary definition.*

(Select all that apply)

☐ Yes, on employer funded parental leave

☐ Yes, on government funded parental leave

☐ Yes, on unpaid parental leave

☐ No

4.1.1d How many weeks of employer-funded paid parental leave is provided?

***Note** – this question is if you offer parental leave to all genders without using the primary/secondary definition.*

- *If you offer employer-funded paid parental leave to all carers regardless of the primary/secondary definition, you must report the minimum number of weeks you provide.*
- *If you offer different packages to certain groups of employees or based on service time, industry or worksite, your minimum would be across all options available to all carers. If you do use the primary/secondary definition, please go back and correct your answer for question 1 of this section.*
- *If you enter a high number of weeks (more than 52), you may be required to reconfirm your data to ensure accuracy.*

4.1.1e Who has access to this type of employer-funded paid primary carers leave?

***Note** – this question is if you offer parental leave to all genders without using the primary/secondary definition.*

(Select all that apply)

☐ Permanent employees

☐ Contract/fixed term employees

☐ Casual employees

☐ Other (provide details)

4.1.1f Do you require carers to work for the organisation for a certain amount of time (a qualifying period) before they can access employer-funded parental leave?

***Note** – this question is if you offer parental leave to all genders without using the primary/secondary definition.*

☐ Yes

How long is the qualifying period (in months)?

☐ No

4.1.1g Do you require carers to take employer- funded paid parental leave within a certain time after the birth, adoption, surrogacy and/or stillbirth?

***Note** – this question is if you offer parental leave to all genders without using the primary/secondary definition.*

☐ Yes

☐ within 6 months

☐ within 12 months

☐ within 24 months

☐ over 24 months

☐ No

4.1.2 Do you provide employer-funded paid parental leave for primary carers in addition to any government-funded parental leave scheme?

A 'primary carer' is the member of a couple or single carer, regardless of gender, identified as having greater responsibility for the day-to-day care of a child.

☐ Yes *(Move to questions 4.1.2a – 4.1.2h and then move to 4.1.3)*

☐ No (*Select from the options below then move to Question 4.1.3*)

☐ Currently under development *(Enter estimated completion date: DD/MM/YYYY)*

☐ Other (provide details)

4.1.2a Please indicate whether your employer-funded paid parental leave for primary carers is available to:

(Select one option)

☐ All, regardless of gender

☐ Women only

☐ Men only

4.1.2b Please indicate whether your employer-funded paid parental leave for primary carers covers:

(Select all that apply)

☐ Birth

☐ Adoption

☐ Surrogacy

☐ Stillbirth

4.1.2c How do you pay employer-funded paid parental leave to primary carers?

(Select one option)

☐ Paying the employee's full salary

☐ Paying the gap between the employee's salary and the government's paid parental leave scheme

☐ As a lump sum payment (for example, paid pre- or post- parental leave, or a combination)

4.1.2d Do you pay superannuation contribution to your primary carers while they are on parental leave?

(Select all that apply)

☐ Yes, on employer funded parental leave

☐ Yes, on government funded parental leave

☐ Yes, on unpaid parental leave

☐ No

4.1.2e How many weeks (minimum) of employer-funded paid parental leave for primary carers is provided?

- *If you offer different packages to certain groups of employees or based on service time, industry or worksite, your minimum would be across all options available to all carers.*
- *If you enter a high number of weeks (more than 52), you may be required to reconfirm your data to ensure accuracy.*

4.1.2f Who has access to this type of employer-funded paid primary carers leave?

Select all that apply.

☐ Permanent employees

☐ Contract/fixed term employees

☐ Casual employees

☐ Other (provide details)

4.1.2g Do you require primary carers to work for the organisation for a certain amount of time (a qualifying period) before they can access employer - funded parental leave?

☐ Yes

How long is the qualifying period (in months)?

☐ No

4.1.2h Do you require primary carers to take employer- funded paid parental leave within a certain time after the birth, adoption, surrogacy and/or stillbirth?

☐ Yes

☐ within 6 months

☐ within 12 months

☐ within 24 months

☐ over 24 months

☐ No

4.1.3 Do you provide employer funded paid parental leave for secondary carers in addition to any government funded parental leave scheme?

☐ Yes *(Move to questions 4.1.3a – 4.1.3h and then move to question 4.2)*

☐ No (*Select from the options below then move to question 4.2*)

☐ Currently under development *(Enter estimated completion date: DD/MM/YYYY)*

☐ Other (provide details)

4.1.3a Please indicate whether your employer-funded paid parental leave for secondary carers is available to:

(Select one option)

☐ All, regardless of gender

☐ Women only

☐ Men only

4.1.3b Please indicate whether your employer-funded paid parental leave for secondary carers covers:

(Select all that apply)

☐ Birth

☐ Adoption

☐ Surrogacy

☐ Stillbirth

4.1.3c How do you pay employer-funded paid parental leave to secondary carers?

(Select one option)

☐ Paying the employee's full salary

☐ Paying the gap between the employee's salary and the government's paid parental leave scheme

☐ As a lump sum payment (for example, paid pre- or post- parental leave, or a combination)

4.1.3d Do you pay superannuation contribution to your secondary carers while they are on parental leave?

(Select all that apply)

☐ Yes, on employer funded parental leave

☐ Yes, on government funded parental leave

☐ Yes, on unpaid parental leave

☐ No

4.1.3e How many weeks (minimum) of employer-funded paid parental leave for secondary carers is provided?

- *If you offer different packages to certain groups of employees or based on service time, industry or worksite, your minimum would be across all options available to all carers.*
- *If you enter a high number of weeks (more than 52), you may be required to reconfirm your data to ensure accuracy.*

4.1.3f Who has access to this type of employer-funded paid secondary carers leave?

(Select all that apply)

☐ Permanent employees

☐ Contract/fixed term employees

☐ Casual employees

☐ Other (provide details)

4.1.3g Do you require secondary carers to work for the organisation for a certain amount of time (a qualifying period) before they can access employer-funded parental leave?

☐ Yes

How long is the qualifying period (in months)?

☐ No

4.1.3h Do you require secondary carers to take employer-funded paid parental leave within a certain time after the birth, adoption, surrogacy and/or stillbirth?

☐ Yes

☐ within 6 months

☐ within 12 months

☐ within 24 months

☐ over 24 months

☐ No

4.2 Does your organisation have an opt out approach to parental leave? (Employees who do not wish to take their full parental leave entitlement must discuss this with their manager)

☐ Yes

☐ No

4.3 Voluntary response: If your organisation would like to provide additional information relating to paid parental leave and gender equality in your workplace, please do so below.

(500 word limit)

Support for carers

4.4 Do you have formal policies and/or formal strategies to support employees with family or caring responsibilities?

This question asks if you have standalone formal policies or strategies on working arrangements to support employees with family or caring responsibilities, or if you include this item in another formal policy or strategy.

You can answer No and give details on the free-text box if you only provide informal arrangements to support employees with family or caring responsibilities.

A carer refers to an employee's role as the parent (biological, step, adoptive or foster) or guardian of a child, or carer of a child, parent, spouse or domestic partner, close relative, or other dependent. If measures to support carers are not available to your employees, you will have the opportunity to indicate why.

☐ Yes (*Select all that apply and move to question 4.4a)*

- ☐ Policy
- ☐ Strategy

☐ No *(Select all that apply and move to question 4.5)*

- ☐ Currently under development *(Enter estimated completion date: DD/MM/YYYY)*
- ☐ Other (provide details) _____

4.4a Do the formal policies and/or strategies include any of the following?

(Select all that apply)

☐ Gender inclusive language when referring to carers
☐ Support for all carers (e.g. carers of children, elders, people with disability)
☐ Paid Parental leave
☐ Flexible working arrangements and adjustments to work hours and/or location to support family or caring responsibilities
☐ Job redesign to support family or caring responsibilities
☐ Extended carers leave and/or compassionate leave
☐ Other leave available to employees with family or caring responsibilities (provide details) _____

4.5. Do you offer any of the following support mechanisms for employees with family or caring responsibilities?

Support Mechanism	Yes, at some worksites	Yes, at all worksites	No
Breastfeeding facilities	☐	☐	☐
Information packs for those with family and/or caring responsibilities	☐	☐	☐
Referral services to support employees with family and/or caring responsibilities	☐	☐	☐
Coaching for employees returning to work from parental leave and/or extended carers leave and/or career breaks	☐	☐	☐
Internal support networks for parents and/or carers	☐	☐	☐
Targeted communication mechanisms (e.g. intranet/forums)	☐	☐	☐
Return to work bonus (only select if this bonus is not the balance of paid parental leave)	☐	☐	☐
Support for employees with securing care (including school holiday care) by securing priority places at local care centres (could include for childcare, eldercare and/or adult day centres)	☐	☐	☐
Referral services for care facilities (could include for childcare, eldercare and/or adult day centres)	☐	☐	☐
On-site childcare	☐	☐	☐
Employer subsidised childcare	☐	☐	☐
Support in securing school holiday care	☐	☐	☐

Parenting workshop targeting mothers	☐	☐	☐
Parenting workshops targeting fathers	☐	☐	☐
Keep-in-touch programs for carers on extended leave and/or parental leave	☐	☐	☐
Access to counselling and external support for carers (e.g. EAP)	☐	☐	☐

☐ Other (provide details)

4.6 Voluntary response: If your organisation would like to provide additional information relating to support for carers in your workplace, please do so below.

(500 word limit)

Sexual harassment, harassment on the ground of sex or discrimination

For the purpose of this section, when we refer to sexual harassment we mean sexual harassment, harassment on the ground of sex or discrimination.

Key Definitions

Sexual harassment *is when a person makes an unwelcome sexual advance, or an unwelcome request for sexual favours, to the person harassed; or engages in other unwelcome conduct of a sexual nature in relation to the person harassed; in circumstances in which a reasonable person, having regard to all the circumstances, would have anticipated the possibility that the person harassed would be offended, humiliated or intimidated.*

Harassment on the ground of sex *is when a person engages in unwelcome conduct of a demeaning nature of another person by reason of their sex or a characteristic that generally relates to or is attributed to their sex. This also takes into account circumstances relating to an individual's sex, age, sexual orientation, gender identity, intersex status, marital or relationship status.*

Discrimination *happens when a person is treated less favourably, in circumstances that are the same or are not materially different, than a person of a different sex, sexual orientation, gender identity, or on the ground of the person's intersex status, marital or relationship status, pregnancy or potential pregnancy, breastfeeding, or family responsibilities.*

Legal obligations

The Sex Discrimination Act 1984 makes it unlawful to discriminate against a person on the basis of gender identity, intersex status, sexual orientation, marital or relationship status, family responsibilities, pregnancy or potential pregnancy or breastfeeding. It also prohibits sexual harassment in many areas of public life including all work-related activity. The Anti-Discrimination and Human Rights Legislation Amendment (Respect at Work) Act 2022 created a positive duty requiring employers to implement measures to prevent sexual harassment, hostile work environments and victimisation. This is in addition to the duty of care employers have under WHS legislation to provide a safe workplace and to eliminate and minimise identified risks to health and safety.

Under the Sex Discrimination Act 1984 it is also unlawful for a person to subject another person to a workplace environment that is hostile on the ground of sex.

For more information, refer to Safework Australia or your State or Territory Work Health and Safety regulatory body. More information about harassment on the ground of sex or discrimination can also be found at the Australian Human Rights Commission website.

Disclaimer

This section is not an exhaustive description of, or advice regarding the legal obligations attaching to employers. Employers are responsible for understanding the scope of rights and obligations attaching to employees and the workplace.

5.1 Do you have formal policies and/or formal strategies on the prevention and response to sexual harassment, harassment on the ground of sex or discrimination?

*The provisions in a '**policy**' and/or '**strategy**' for prevention and management of sexual harassment is important for setting workplace culture and achieving a safe, respectful and inclusive workplace. Policies/Strategies alone will not prevent harassment and discrimination; however, they can help to set clear expectations, particularly about behaviours at the workplace and during work-related activities.*

☐ **Yes** *(Select all that apply below and then move to question 5.1a)*

☐ Policy

☐ Strategy

☐ **No** *(Select from options below then move to question 5.2)*

☐ Currently under development (Enter estimated completion date: DD/MM/YYYY)

☐ Other (provide details)

5.1a Do the formal policies and/or formal strategies include any of the following?

(Select all that apply)

☐ A statement on the positive duty of the employer to provide a safe workplace, free of sexual harassment

☐ Leadership accountabilities and responsibilities for prevention and response to sexual harassment

☐ Expectations of manager and non-manager training on respectful workplace conduct and sexual harassment

☐ Process to disclose, investigate and manage any sexual harassment

☐ Process for parties to agree on the investigator of an incident

☐ Expectations and management of personal/intimate relationships

☐ Processes relating to the use of non-disclosure or confidentiality agreements

☐ The frequency and nature of reporting to the governing body and management on sexual harassment

☐ Expectations of safety, respect and inclusive conduct in recruitment materials, contracts and performance management

☐ Guidelines for human resources or other designated responding staff on confidentiality and privacy

☐ Inclusive and respectful behaviour is part of regular performance evaluation

☐ How risks will be identified and assessed, and how control measures will be monitored, implemented and reviewed

☐ Process for development and review of the policy, including consultation with employees, unions or industry groups

☐ A system for monitoring outcomes of sexual harassment and discrimination complaints, including employment outcomes for complainants and accused perpetrators

☐ Expectations of manager and non-manager training on respectful workplace conduct and sexual harassment

☐ Other (provide details)

5.2 Have the policies and/or strategies been reviewed and approved in the reporting period by the Governing Body and CEO (or equivalent)?

	Yes	No
By the Governing Body	☐	☐
By the CEO (or equivalent)	☐	☐

5.3 Do you provide training on the prevention of sexual harassment, harassment on the ground of sex or discrimination to the following groups?

☐ **Yes** *(Select all that apply below and then move to question 5.3a)*

Cohort	At induction	At promotion	Annually	Multiple times a year
All managers	☐	☐	☐	☐
All non-managers	☐	☐	☐	☐
The governing body	☐	☐	☐	☐

☐ **No** *(Select from options below then move to question 5.4)*

☐ Currently under development (Enter estimated completion date: DD/MM/YYYY)

☐ Not aware of the need

☐ Other (provide details) [ ]

5.3a Does the training program delivered to the above groups include any of the following?

(select all that apply)

☐ The respectful workplace conduct and behaviours expected of workers and leaders

☐ Different forms of inappropriate workplace behaviour (e.g. sexual harassment, harassment on the grounds of sex and discrimination) and its impact

☐ The drivers and contributing factors of sexual harassment

☐ Bystander training

☐ Options for reporting occurrences of sexual harassment as well as the risk of sexual harassment occurring

☐ Information on worker rights, external authorities and relevant legislation relating to workplace sexual harassment

☐ Diverse experiences and needs of different people, including women, LGBTIQ+ workers, CALD workers and workers with a disability.

☐ Trauma-informed management and response to disclosures
☐ Self-care and vicarious trauma training for employees, witnesses and responding staff
☐ Other (please describe)

5.4 Does the governing body and/or CEO or equivalent explicitly communicate their expectations on safety, respectful and inclusive workplace conduct? If yes, when?

Culture is set and role modelled by leaders – the tone from the top of the organisation should promote an organisation that is respectful, safe and inclusive, and should be backed up by action.

Examples of communication could include:

- *regular agenda items at meetings between the governing body and CEO or equivalent*
- *Statements from the governing body or CEO in annual reports*
- *Statements at events or prior to large events (such as work Christmas parties or conferences)*
- *Regular email communication to staff*

Members of the governing body

☐ **Yes** *(when or how frequently are expectations communicated)*

☐ The expectations of the governing body is made explicit to new staff at induction

☐ Other communications are made annually

☐ Other communications are made more often than annually

☐ Other (provide details)

☐ **No**

Chief Executive Officer or equivalent

☐ **Yes** *(when and/or how frequently are expectations communicated)*

☐ The expectations of the CEO or equivalent is made explicit **at inductions**

☐ The expectations of the CEO or equivalent is made explicit to staff **when promoted**

☐ The CEO or equivalent has made explicit the expectation of line manages in communicating on respectful workplace behaviour

☐ Explicit communications occur ahead of big events (e.g. the Christmas party, conferences) or at internal launches (e.g. at the launch of a new strategy)

☐ Other communications are made annually

☐ Other communications made more often than annually

☐ Other (provide details)

☐ **No**

5.5 Does your workplace health and safety risk management process include any of the following?

Sexual harassment is a workplace hazard that is known to cause psychological and physical harm. Managing the risks of sexual harassment should be part of your approach to work health and safety. For more information about sexual harassment as a work health and safety risk, please refer to Safework Australia's Guide for preventing workplace sexual harassment.

(Select all that apply)

☐ Identification and assessment of the specific workplace and industry risks of sexual harassment

☐ Control measures to eliminate or minimise the identified drivers and risks for sexual harassment so far as reasonably practicable

☐ Regular review of the effectiveness of control measures to eliminate or minimise the risks of sexual harassment

☐ Consultation on sexual harassment risks and mitigation with staff and other relevant stakeholders (e.g. people you share premises with)

☐ Reporting to leadership on workplace sexual harassment risks, prevention and response, incident management effectiveness and outcomes, trend analysis and actions

☐ Identification, assessment and control measures in place to manage the risk of vicarious trauma to responding staff

☐ Other (*provide details*)

☐ None of the above

5.5a What actions/responses have been put in place as part of your workplace sexual harassment risk management process?

(Select all that apply)

☐ Make workplace adjustments
☐ Change or develop new control measures
☐ Undertake and act on a culture audit of the relevant business or division
☐ Train people managers in prevention of sexual harassment
☐ Train identified contact officers
☐ Train staff on mitigation and control measures

☐ Implement other changes (*provide details*)

☐ None of the above *(You may specify why)*

5.6 From the following list, what do you provide to support workers involved in and affected by sexual harassment?

(Select all that apply)

☐ Trained, trauma-informed support staff/contact officers

☐ Confidential external counselling (E.g. EAP)

☐ Information provided to all workers on external support services available

☐ Union/worker representative support throughout the disclosure process and response

☐ Reasonable adjustments to work conditions

☐ Other (description)

☐ None of the above *(You may specify why)*

5.7 From the following list, what options does your organisation have for workers who wish to disclose or raise concerns about incidents relating to sexual harassment or similar misconduct?

Disclosure refers to a formal or informal complaint of workplace sexual harassment.

☐ Process for disclosure to human resources or other designated responding staff

☐ Process for disclosure to confidential/ethics hotline or similar

☐ Process for disclosure to union/worker representative

☐ Process to disclose after their employment has concluded

☐ Process to disclose anonymously

☐ Special procedures for disclosures about organisational leaders and board members

☐ Process for workers to identify and disclose potential risks of sexual harassment, without a specific incident occurring

☐ Other (provide details)

☐ None of the above *(You may specify why)*

5.8 Does your organisation collect data on sexual harassment in your workplace, if yes, what do you collect?

☐ Yes *(select all that apply)*

- ☐ Number of formal disclosures or complaints made in a year
- ☐ Number of informal disclosures or complaints made in a year
- ☐ Anonymous disclosures through a staff survey
- ☐ Gender of the complainant/aggrieved or victim
- ☐ Gender of the accused or perpetrator
- ☐ Outcomes of investigations
- ☐ Other (provide details)

☐ No

5.9. Does your organisation report on sexual harassment to the governing body and management (CEO, KMP, HOB) and how frequently?

Sexual harassment, harassment on the grounds of sex or discrimination should be monitored by governing bodies and management. Reports may include prevalence risks, and nature of workplace sexual harassment; organisational action taken to prevent and respond to sexual harassment; outcomes and effectiveness of responses, including consequences for perpetrators; and analysis of trends and data in the workplace and broader industry.

Head of Business (HOB):

- *the CEO or equivalent of a subsidiary organisation within your corporate group*
- *an employee who has strategic control and direction over a substantial part of the business, but whose responsibilities do not extend across an entire corporate group, such as the head of a brand within a group.*

Key Management Personnel (KMP):

- *in line with Australian Accounting Standards Board AASB124,* ***KMPs*** *have the authority and responsibility for planning, directing and controlling the activities of an entity, directly or indirectly. This includes any director (executive or otherwise) of that entity.*
- *a defining feature of KMPs is their influence is at the entity level. KMPs are likely to direct the strategic function of their section and are often functional heads, such as head of operations or head of finance. They represent at least one of the major functions of an organisation and participate in organisation-wide decisions.*
- *for corporate groups, KMPs will have authority and responsibility across the entire structure.*

☐ **Yes** *(select all that apply and go to Question 5.9a)*

Cohort	Regularly / At every meeting	Multiple times per year	Annually
Governing Body	☐	☐	☐
CEO, HOBs	☐	☐	☐
KMPs	☐	☐	☐
All managers	☐	☐	☐

☐ Other (provide details)

☐ **No** *(You may explain why not and go to question 5.10)*

5.9a Do your reports on sexual harassment to governing body and management include any of the following?

(Select all that apply)

☐ Identified risks of workplace sexual harassment

☐ Prevalence of workplace sexual harassment

☐ Nature of workplace sexual harassment

☐ Analysis of sexual harassment trends

☐ Organisational action to prevent and respond to sexual harassment

☐ Outcome of reports of sexual harassment

☐ Consequences for perpetrators of sexual harassment

☐ Effectiveness of response to reports of sexual harassment

☐ Use of non-disclosure agreements or confidentiality clauses

☐ Other (provide details)

5.10 Voluntary response: If your organisation would like to provide additional information relating to measures to prevent and respond to sexual harassment, harassment on the ground of sex or discrimination, please do so below.

(500 word limit)

Family or domestic violence

5.11 Do you have a formal policy and/or formal strategy to support employees who are experiencing family or domestic violence?

This question asks if you have a formal policy or strategy to support employees experiencing this kind of violence. If you answer yes, you will either have a standalone formal policy or strategy, or include this item in another formal policy or strategy.

Family or domestic violence involves violent, abusive or intimidating behaviour from a partner, carer or family member to control, dominate or instil fear. It can be physical, emotional, psychological, financial, sexual or another type of abuse. If measures to support employees experiencing family or domestic violence are not available in your organisation, you will have the opportunity to indicate why.

☐ Yes *(Select all that apply)*

- ☐ Policy
- ☐ Strategy

☐ No *(Select all that apply)*

- ☐ Currently under development *(Enter estimated completion date: DD/MM/YYYY)*
- ☐ Other (provide details)

5.12 Do you have the following support mechanisms in place to support employees who are experiencing family or domestic violence?

Type of support *(select all that apply)*

Protection from any adverse action or discrimination based on the disclosure of domestic violence	☐
Confidentiality of matters disclosed	☐
Training of key personnel	☐
Flexible working arrangements	☐

Workplace safety planning ☐

Employee assistance program (including access to psychologist, chaplain or counsellor) ☐

Referral of employees to appropriate domestic violence support services for expert advice ☐

Provision of financial support (e.g. advance bonus payment or advanced pay) ☐

A domestic violence clause is in an enterprise agreement or workplace agreement ☐

Access to medical services (e.g. doctor or nurse) ☐

Offer change to office location ☐

Emergency accommodation assistance ☐

☐ Other (provide details)

5.13 Do you have the following types of leave in place to support employees who are experiencing family or domestic violence?

Access to paid domestic violence leave

☐ Yes

Is it unlimited?

☐ Yes

☐ No

How many days of paid domestic violence leave are provided? *(Enter number of days)*

days

☐ No

Access to unpaid domestic violence leave

☐ Yes

Is it unlimited?

☐ Yes

☐ No

How many days of unpaid domestic violence leave are provided? *(Enter number of days)*

days

☐ **No**

5.14 Voluntary response: Have any of your employees taken paid family and domestic violence leave in the last 12 months?

This information is sought to inform Government about utilisation of family and domestic violence leave in the context of the new entitlement to 10-days paid family and domestic violence leave as a National Employment Standard under the Fair Work Act 2009. Deidentified data will be shared for this purpose and may also be released together with WGEA's public data release at aggregate level (meaning across the whole WGEA dataset and not at the organisational level).

☐ Yes *(Answer questions 4.1 – 4.3)*

5.14a How many employees took paid family and domestic violence leave in the last 12 months?

5.14b What is the total number of days of paid family and domestic violence leave taken by all your employees in the last 12 months?

5.14c How many employees took all the days of paid family and domestic violence leave that they were entitled to in the last 12 months?

☐ No *(Go to question 5)*

5. Voluntary response: If your organisation would like to provide additional information relating to family and domestic violence affecting your employees, please do so below.

(500 word limit)

Voluntary section - Diversity and Inclusion

Privacy legislation defines information about an individuals race or ethnic origin and health as sensitive information.

Sensitive information that may identify an individual must not be collected or shared without the individual's consent.

Gender inequality is not experienced in the same way by all women, men and non-binary people. Different dimensions of identity, including race, sexual orientation, disability, and age, can intersect and influence individual experiences and outcomes at work.

These questions focus on diversity data. They ask whether your organisation has a formal policy and/or formal strategy on diversity and inclusion as well as whether your organisation collects certain diversity data on employees.

6.1 *Voluntary question*: Do you have a formal policy and/or formal strategy on diversity and inclusion in your organisation?

☐ Yes *(Select all that apply)*

- ☐ Aboriginal and/or Torres Strait Islander identity
- ☐ Cultural and/or language and/or race/ethnicity background
- ☐ Disability and/or accessibility
- ☐ Gender identity
- ☐ Age
- ☐ Other

☐ No *(Select all that apply)*

- ☐ Currently under development *(Enter estimated completion date: DD/MM/YYYY)*
- ☐ Other (provide details)

6.2 *Voluntary question*: Does your organisation collect data on any of the following dimensions of employees' identities?

☐ Yes, Aboriginal and/or Torres Strait Islander identity	This data is: ☐ provided anonymously and is not identifiable (i.e., the employer cannot determine which employees identify in this way) ☐ not anonymous and is identifiable (i.e., the employer can determine which employees identify in this way)
☐ Yes, Cultural and/or language and/or race/ethnicity background	This data is: ☐ provided anonymously and is not identifiable (i.e., the employer cannot determine which employees identify in this way) ☐ not anonymous and is identifiable (i.e., the employer can determine which employees identify in this way)
☐ Yes, Disability and/or accessibility	This data is: ☐ provided anonymously and is not identifiable (i.e., the employer cannot determine which employees identify in this way) ☐ not anonymous and is identifiable (i.e., the employer can determine which employees identify in this way)
☐ Yes, Gender identity	This data is: ☐ provided anonymously and is not identifiable (i.e., the employer cannot determine which employees identify in this way) ☐ not anonymous and is identifiable (i.e., the employer can determine which employees identify in this way)

6.3 *Voluntary question*: Do you collect data on whether employees identify as Aboriginal and/or Torres Strait Islander?

This information is sought to support the Australian Government's commitment to bring employment levels of First Nations working age Australians to levels consistent with share of population by 2030. WGEA will provide information on the totals provided by the 200 largest employers to the National Indigenous Australians Agency. Deidentified data may also be released together with WGEA's public data release at aggregate level (meaning across the whole WGEA dataset and not at the organisational level).

'X' is a voluntary option to cover members who do not identify as either male or female as defined in the Reporting Guide | WGEA

☐ Yes

Total number of:	**Female**	**Male**	**X**
Aboriginal and/or Torres Strait Islander Managers			
Aboriginal and/or Torres Strait Islander Non-managers			

☐ No

Australian Government

Fair Work OMBUDSMAN

Attachment A-3

Consultation and cooperation in the workplace best practice guide

Australian Government Fair Work OMBUDSMAN

Consultation and cooperation in the workplace best practice guide

This best practice guide is for managers and employers of employees. It explains the advantages of taking a best practice approach to consultation and cooperation in your business. It includes:

- Working at best practice
- Consultation and cooperation in the workplace
- Legal requirement to consult
- Using best practice to support consultation and cooperation in the workplace
- Best practice checklist
- Where to find more information.

It also has practical tips and case studies to help you move your business towards best practice.

While this best practice guide relates to employees and employers, there may also be a requirement to consult with some types of independent contractors (known as regulated workers) if they are covered by minimum standards orders or guidelines, road transport contractual chain orders or guidelines or a collective agreement with a consultation term. For more information on regulated workers visit fairwork.gov.au/regulated-workers.

Working at best practice

When running a business, you're likely to face challenges that affect both your business and your employees. Sometimes these challenges are small, such as introducing a new staff training program. Other times they're large, such as a significant fall in sales. Best practice employers examine and talk about these challenges with their staff. They aim for a genuine exchange of information and opinions and collaborate to reach solutions.

Every workplace can enjoy the benefits of taking a best practice approach to consultation and cooperation. These may include:

- better decision making when employees have input
- easier change implementation, as employees have been involved in the planning process
- better business performance during change, as less time is spent on responding to misunderstandings, rumours or disputes
- improved employee engagement and performance.

Consultation and cooperation in the workplace

Consultation means asking for and considering employees' views when making decisions. Cooperation means working together harmoniously to find solutions.

Consultation is important during major workplace change. This means any change to the business that will affect employees in a significant way, for example different working hours, duties, work locations or redundancies.

Employers who take a consultative and cooperative approach still have the right to make the final decision on how to manage their business. Employees who have the opportunity to be a part of the process are more likely to accept change and are less likely to feel anxious or fearful. Being consulted about important decisions in the workplace can improve an employee's engagement with their work.

CASE STUDY – Consulting staff about organisational restructures

A larger-sized stationery retailer has been through two reorganisations in the past 5 years. Each time, management consulted with employees before any restructuring decisions were made. They did so by setting up a structured framework for meetings between managers and staff. Some meetings were 1-on-1 and some were in teams.

Management made a conscious decision to be open and honest about the problems they were having. They asked employees to analyse their own roles and the roles they thought were needed for the future. They also asked each team to consider sales and financial data and suggest ways they could respond to lower sales.

The process took 3 to 4 months each time. The business believes it was worth it because the restructuring went smoothly and the employees who stayed with the business remained engaged and committed to it.

Legal requirement to consult

Requirements to consult with employees about significant changes in the workplace are set out in legislation, awards and enterprise agreements.

Consultation requirements in awards

Awards contain standard consultation clauses.

These require employers to consult with employees and their representatives if:

- they intend to change an employee's regular roster or ordinary hours of work, or
- they intend to make significant changes at the workplace.

Consultation about changes to rosters or hours of work

An employer who intends to change regular rosters or ordinary hours of work at a workplace must consult with employees affected by the change first.

The employer must:

- provide employees and their representatives with information about the proposed change
- invite the employees and their representatives to give their views about the impact of the proposed change, including any impact on family and caring responsibilities
- consider any views given by the employees or their representatives.

If the award also has rules about rostering and ordinary hours (for example in a different clause), the employer needs to follow those rules first. This means that if the award says that the employer needs the employee's consent to make any changes to their roster or ordinary hours, this applies. They can't make the changes without consent by just using the consultation clause.

Consultation about major workplace change

Consultation clauses generally require consultation where an employer has decided to introduce major changes in production, programming, organisation, structure or technology that are likely to significantly affect employees. They also require the employer to:

- notify any employees who might be affected by the proposed changes, and their representatives
- discuss the proposed changes with the affected employees and any representatives as soon as possible after a decision is made
- provide them with written information about the changes, how they might affect employees, and any measures the employer will put in place to prevent or reduce any adverse effects
- give prompt consideration to any matters raised by the employees and their representatives.

While an employer must consider the matters raised by the employees, they don't have to obtain the consent of employees or their representatives to make the proposed changes.

Consultation requirements in enterprise agreements

An enterprise agreement must contain a consultation term that:

- requires the employer to consult with employees about any major workplace changes or changes to their regular roster or ordinary hours of work
- allows employees to be represented during the consultation (for example, by an elected employee or a representative from a union).

Any agreement lodged without a consultation clause will automatically have a 'model consultation term' included in the agreement.

PRACTICAL TIP: Read the consultation and dispute resolution clauses set out in your award or registered agreement. These are usually found in Part 2 of an award.

Use our Find My Award tool at fairwork.gov.au/findmyaward or visit the Fair Work Commission's Agreements page at fwc.gov.au/agreements to find the award or agreement that applies to your workplace.

Consultation requirements when terminating 15 or more employees

The Fair Work Act requires an employer to notify or consult with a union if:

- they decide to dismiss 15 or more employees for economic, technological, structural or similar reasons; and
- they knew or should have known that at least 1 of the employees was a union member.

The employees don't need to be covered by an award or enterprise agreement. Employers are also required to notify Centrelink before dismissing 15 or more employees.

Consultation regarding work health and safety

Employers should be aware they might have additional consultation duties with employees who have health, safety and welfare issues in the workplace. These consultation requirements fall under state or territory work health and safety laws. Find the contact details for your state or territory body in the Where to find more information section at the end of this guide.

An employer working at best practice will routinely consult with its employees on these important issues.

Other situations

The Fair Work Act sets out other situations where an employer must engage with its employees or their representatives. These include:

- when bargaining in good faith in the negotiation of the terms of an enterprise agreement
- where an employee who is entitled to request a flexible working arrangement makes such a request
- when negotiating an individual flexibility arrangement with an employee under an award or enterprise agreement
- when an employee is on parental leave, and the employer makes a decision that will have a significant effect on the employee's pre-parental leave position
- when an employee requests to extend their parental leave after the initial 12 months.

PRACTICAL TIP: Discussing workplace issues can be difficult for both employers and employees, especially when emotions are involved.

Complete our free Difficult conversations in the workplace online course to learn practical tips to manage conversations and achieve positive outcomes. The course is available from fairwork.gov.au/learning.

Using best practice to support consultation and cooperation in the workplace

Best practice doesn't look the same for all employers. The way to achieve best practice will vary because of things like the number of employees, industry and the business environment.

Below are initiatives and suggestions that can help you move your business towards best practice.

Develop a communication strategy

An internal communication strategy outlines exactly how your business will deliver key messages to your staff. How sophisticated the communication strategy should be depends on the size of your business and the type of changes involved. For smaller businesses, this can be a simple document setting out the ground rules for when and how staff communications will be handled, and who will handle them. Your communications strategy should cover:

- **What** – the types of information or key messages that will be communicated to staff
- **Who** – the messages should come with the authority of senior managers. Engaging representatives from different parts of the organisation ensures the communication is seen as having broad support by management
- **How** – messages should be clear, consistent and given with context so employees can better understand them. Also consider which communication methods will be used
- **When** - the communication should be prompt and give employees time to respond.

Seek feedback on how your employees are receiving communications. Be flexible and refine your strategy over time to make sure it remains effective and practical.

Establish communication channels

There are many communication methods that you can use with your employees. Most businesses use more than one method. A good communication channel will have the following key elements:

- **It's authentic** – employees know their employer genuinely wants to listen to them
- **It's regular** – how regular will depend on the method. Team meetings might occur weekly or fortnightly, but employee surveys may happen once a year
- **It's targeted** – while there might be some overlap, employees should know what type of communication method is more appropriate for certain information
- **It's two-way** – employees know their employer will consider what they have to say and will respond.

PRACTICAL TIP: Some examples of communication methods include:

- **An 'open door' policy** – this means that owners or managers commit to being open and responsive to any work-related matters their employees want to bring to them
- **Meetings** – this could include team meetings, toolbox talks or 'town hall' meetings for the whole workforce. Large employers with staff in multiple locations might also organise senior managers to visit each location
- **Surveys** – employers might ask employees to participate in a survey to find out what they like (or don't like) in the workplace, what the employer is doing well and areas for improvement. Allowing employees to complete a survey anonymously is a good way to get honest feedback
- **Employee committees** – a consultative committee usually meets once every few months to discuss workplace issues and suggest actions. It's important that management is accountable for considering any of the committee's suggestions and responding in a timely way
- **Social media and other technology** – employers can also make good use of social media, electronic forums, video blogs and other technology to create new kinds of communication.

Learn to communicate effectively

Using a variety of different communication channels isn't very effective if the quality of the communication is poor. Best practice employers know how to communicate effectively and encourage their managers and employees to also communicate clearly, honestly and respectfully.

The following initiatives can be used to promote effective communication in your workplace:

- Role model the standard of communication you want and, if needed, work on your own communication skills
- Recognise employees who communicate effectively and constructively
- Take the time to explain your expectations about communication to new employees before they start. Employees have a diverse range of backgrounds and life experience. It makes sense to spend some time with them to explain how the business expects employees to communicate with each other
- Regularly share information about the business. If you don't want to share financial data, pick a non-financial performance indicator such as how many meals were sold or haircuts given, how the team is tracking against KPIs, and customer feedback. You should also share technological developments that could impact the business and any upcoming staffing changes. Most employees are very interested in what's happening in the business and how it's performing, especially if that might impact on their job security.

PRACTICAL TIP: Improve your communication with these tips:

- communicate face to face wherever possible, especially for important messages
- give the communication your full attention
- make your communication as clear and as honest as you can
- listen reflectively and actively and check that you have heard the message correctly
- respond respectfully, be empathetic ('I can appreciate why you feel that way...')
- ask questions
- pay attention to body language and non-verbal triggers
- be aware that different cultures have different ways of communicating respectfully (for example not making eye contact or favouring private rather than public praise)
- take care with written communications, such as emails. Check that the language you use is clear and will not intimidate or offend the recipient.

Analyse the change

Before consulting your employees about a proposed workplace change, you need to consider what that change might mean for your business.

'SWOT' is a commonly used business analysis and decision-making tool. A SWOT analysis helps you:

- build on strengths (S)
- minimise weakness (W)
- seize opportunities (O)
- counteract threats (T).

All you need to begin is something that you want to analyse, for example, the proposed introduction of new technology in your business. First, identify all the SWOT points for the change. This might be:

- the new technology will improve employee productivity (S)
- because it's new technology, there may be teething problems at the start (W)
- it should ultimately allow the business to produce more at a lower cost (O)
- redundancies may be necessary if the technology is implemented (T).

These points will be key messages in your consultation. Finally, consult with staff and develop a strategy to address the issues in the SWOT.

CASE STUDY – Consulting staff in times of change

In 2020 many employees' work arrangements changed because of the impacts of coronavirus. The Fair Work Act and awards were temporarily changed to give employers and employees extra flexibility with respect to hours, work location and stand downs. Some of these temporary provisions contained specific consultation requirements that had be followed.

Best practice employers communicated with employees about the business impacts of coronavirus and consulted with employees about how they might change their operations and respond to new opportunities. These consultations helped many businesses gain the buy-in needed to quickly adapt to new or different ways of working.

Plan your consultation

Consultation is most effective when it's carefully considered and planned. Best practice employers create a consultation strategy whenever they need to consult with staff about significant workplace change.

There are many ways to consult with employees, but key elements include:

- The employees know what's being considered. They understand the change and its potential impact on the workforce
- There is a clear process for consultation and employees know who will make the final decision and how
- Management and employees then work together to identify any workforce issues or problems arising out of the change and agree on ways to solve those problems.

Your consultation plan should set out how consultation will occur and who will be involved.

You might be able to use some existing communication channels for this (such as team meetings, newsletters or webinars). Existing processes for sharing information may be insufficient to properly consult on important issues. In these cases, consider specific consultation arrangements such as focus groups or consultation workshops with staff.

CASE STUDY – Talking circles

A security organisation experienced a critical incident at the workplace. As a result, changes in the workplace were required. The managers invited employees to take part in 'talking circles' where they could talk about the impact of the proposed changes on their jobs, make suggestions and evaluate options. An outside facilitator helped with the process.

Afterwards, decisions were reached, and changes were made. The employees reported feeling better because they had the chance to offer their views and suggestions about the changes. The organisation felt pleased they'd thought of an original approach that worked for this situation that was co-designed with employees.

PRACTICAL TIP: A structured workshop consultation process can help achieve effective consultation. To run an effective consultation workshop:

- Set aside enough time to get the most out of the discussion
- Hold the workshop somewhere where your employees won't be distracted by work
- Make sure the senior people in your business attend
- Begin by outlining the proposed changes and encourage questions to make sure everyone understands the facts
- Have the group brainstorm ideas and record all the points (SWOT analysis can be a useful approach)
- Prioritise - ask the group to each identify their top 3 points
- Finally, ask the group to break into smaller groups to talk about the priority issues further. Ask them to think of ways in which the weaknesses or threats can be reduced, strengths built on and opportunities maximised.

Review your position and inform employees

The purpose of consultation is to genuinely listen to your employees and consider their input.

Consider the information and ideas shared by staff. Once you've determined your position, you should consider:

- When assessed against business requirements, how have the information and ideas shared by staff affected your position?
- Have you recorded any decisions made and the reasons why?
- Have you communicated the decision and reasons for it with employees and representatives?

Best practice checklist

A best practice workplace involves more than just understanding and complying with the law. This checklist will help you work at best practice:

☐ **Set your business up for good communication.** You can do this by implementing an internal communication strategy, establishing good communication channels and setting clear standards for communication in your workplace. Remember:

- key messages should be clear, consistent and given with context
- select communication channels carefully
- the communication should invite responses
- seek feedback on how your employees are receiving your communications.

☐ **Analyse the change**. Use a SWOT analysis (or similar) to help you identify the key strengths, weakness, opportunities and threats associated with the proposed change. Use your analysis to identify issues and inform the key messages for staff.

☐ **Decide on a consultation strategy**. Plan how you will consult your employees. When developing your consultation strategy consider:

- How will you help your employees understand the change and its potential impact on them?
- How will management and employees work together to identify and solve issues?

☐ **Review your position about the change.** Consider the information and ideas shared by staff.

☐ **Inform employees**. Communicate the decision and reasons with employees and representatives.

☐ **Implement the required changes.**

ⓘ Where to find more information

Resources

- To check the consultation clause in your award – use our Find My Award tool at fairwork.gov.au/findmyaward.
- To check the consultation clause in an enterprise agreement - visit the Fair Work Commission's Agreements page at fwc.gov.au/agreements.
- Access our free online training for employers and managers at fairwork.gov.au/learning. Available courses cover best practice approaches to difficult conversations in the workplace, managing employees, managing performance, hiring employees, diversity and discrimination, workplace flexibility and record-keeping and pay slips.
- Find all our Best practice guides at fairwork.gov.au/bestpracticeguides. These easy-to-follow and practical guides will help you transform your business from compliant to best practice, so you can get the most out of your employees.

Links

Fair Work Commission

- fwc.gov.au

State & Territory work health and safety bodies

- ACT - WorkSafe ACT
  worksafe.act.gov.au
- SA - SafeWork SA
  safework.sa.gov.au
- TAS - WorkSafe Tasmania
  worksafe.tas.gov.au
- NSW- SafeWork NSW
  safework.nsw.gov.au
- QLD – WorkCover Queensland
  worksafe.qld.gov.au
- VIC – WorkSafe Victoria
  worksafe.vic.gov.au

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Fair Work OMBUDSMAN

CONTACT US

Fair Work online: fairwork.gov.au

Fair Work Infoline: **13 13 94**

Need language help?

Contact the Translating and Interpreting Service (TIS) on **13 14 50**

Help for people who are deaf or have hearing or speech difficulties

You can contact us through the National Relay Service (NRS).

Select your preferred access option and give our phone number: **13 13 94**

The Fair Work Ombudsman is committed to providing you with advice that you can rely on. The information contained in this fact sheet is general in nature. If you are unsure about how it applies to your situation you can call our Infoline on 13 13 94 or speak with a union, industry association or a workplace relations professional.

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Attachment A-4

Effective dispute resolution best practice guide

This best practice guide is for employers and managers. It explains how you can use best practice to avoid, manage and resolve disputes in your business.

It includes:

- Working at best practice
- Dispute resolution
- Legal requirements
- Using best practice to avoid, manage and resolve disputes in your workplace
- Get help with a dispute
- Best practice checklist
- Where to find more information.

It also has practical tips and case studies to help you move your business towards best practice.

Dispute resolution for regulated workers

Some independent contractors have special laws that apply to them. These types of contractors are called regulated workers. A regulated worker is an employee-like worker doing digital platform work (for example, work in the gig economy) or a regulated road transport contractor.

The Fair Work Commission (the Commission) can set rules about dispute resolution for regulated workers. For more information on regulated workers visit fairwork.gov.au/regulated-workers.

Working at best practice

Disputes and complaints can happen at any workplace. A dispute exists when one or more people disagree about something and the matter remains unresolved. Often disputes can be settled quickly and informally in the course of everyday work. However, if people can't agree on a way forward or if the dispute is about a serious matter, you might need a more formal approach.

Best practice employers have simple, fair, confidential and transparent dispute resolution procedures in place. These employers take disputes seriously and address issues quickly and effectively, so they don't escalate.

Every workplace can enjoy the benefits of taking a best practice approach to dispute resolution. These may include:

- greater employee productivity through increased job satisfaction
- improved employee retention
- reduced stress for managers and employees
- better relationships with employees
- reducing the costs that come from resolving disputes externally (such as legal fees associated with dealing with claims made by employees against the employer).

Dispute resolution

Dispute resolution is how disputes are brought to an end. This can occur through:

- a negotiated outcome, where the parties concerned resolve the issue themselves
- a mediated outcome, where an independent mediator helps the parties arrive at their own agreement, or
- an arbitrated or adjudicated outcome, where an independent arbitrator or court decides how the dispute should be resolved and makes a binding decision or order to that effect.

Disputes can happen for many reasons, including:

- different personalities and personality clashes
- unresolved problems from the past
- competition between employees
- poor communication and leadership
- unclear responsibilities and roles
- bullying, harassment and other unlawful and inappropriate behaviour.

Understanding the causes of conflict will help you to avoid disputes. See An employer's guide to resolving workplace issues at fairwork.gov.au/employer-guide or visit our Workplace problems page at fairwork.gov.au/workplace-problems for tips on how to identify and resolve workplace issues.

Legal requirements under the Fair Work Act

Employees have access to the dispute resolution procedure set out in the award or agreement that covers them. This procedure can be used to settle disputes related to that award or agreement, or to the National Employment Standards.

Awards

Dispute resolution clauses can vary between awards, but generally have a similar approach to resolution procedures, including:

1. **Resolution within the workplace**

   The employee and their manager must first try to resolve the dispute through discussion. If this is unsuccessful, then senior management discusses the matter with the employee to try and resolve the dispute. This could involve one or more escalations to senior managers, depending on the structure of the business.

2. **Resolution outside the workplace**

   An employee, the employer or their representatives may refer the dispute to the Commission after all appropriate steps have been taken within the workplace. The Commission can deal with a dispute through conciliation, mediation or, if agreed by the parties, arbitration.

If the dispute still isn't resolved, the Commission can use any method of dispute resolution permitted by the Fair Work Act that it considers appropriate to ensure the dispute is settled.

Enterprise Agreements

The parties to an enterprise agreement agree to a dispute resolution procedure during the bargaining process. Before approving an enterprise agreement, the Commission must check that it contains a dispute resolution clause which:

- has a procedure that requires or allows the Commission or another independent person to settle disputes about any matters arising under the agreement or the NES
- allows employees to have a representative.

The Fair Work Regulations provide a model dispute resolution term that can be included in enterprise agreements. See Where to find more information in this guide for more information.

Check your award or agreement to see what dispute resolution process applies to your workplace. Visit fairwork.gov.au/employment-conditions.

For more information on how the Commission can assist with disputes at work see fwc.gov.au/issues-we-help.

Dispute resolution for regulated workers

A regulated worker may be covered by a minimum standards order, road transport contractual chain order and/or a collective agreement. Each of these workplace instruments will include terms on dispute resolution. For more information on regulated workers visit fairwork.gov.au/regulated-workers.

Using best practice to avoid, manage and resolve disputes at work

The best way to handle a workplace dispute depends on the people affected and the nature of the conflict. For example, a dispute about someone's pay should be dealt with differently to a dispute involving a group of employees about proposed changes to their working hours.

Below are initiatives and suggestions that can help you implement a best practice approach to managing disputes.

Recognise the signs of conflict

Best practice employers can identify and address the signs of conflict. By seeing the signs early, they have a better chance of resolving the conflict before it turns into a dispute.

Sometimes the signs of conflict can be obvious (for example, if you observe an argument in the workplace). Not all forms of conflict are so visible. Signs of conflict may include:

- **lack of employee motivation** – an employee might stop participating in team meetings or volunteering to take on new tasks
- **a change in behaviour** – employees might become more reserved, less engaged or even hostile
- **decreased productivity** – you might notice less output from your staff, or that they take longer than usual to do their work
- **absenteeism** – your employees might start coming to work late or taking more time off than usual.

Encourage open communication

Whatever the size or nature of the business, employees need to know who to speak to about their issues or grievances, and what action will be taken to attempt to resolve them.

Encourage employees to communicate their problems openly, honestly and respectfully. Managers need to know how to prepare for these conversations, what to say, how to listen and how to explore ways to resolve the issue.

CASE STUDY – Communication

Jamila works in a café. She thinks there might be a problem with her pay and tries to speak with her manager. The manager says Jamila's pay is correct, but that she doesn't have time to talk about it.

Jamila feels frustrated and distracted at work. She is still unsure about her pay and is now upset with her manager. Her manager notices Jamila's performance has declined but is unsure why.

A few weeks later Jamila contacts the Fair Work Ombudsman, who check her award classification and explain that her pay is correct.

While Jamila's employer wasn't doing anything against the law, this issue could have been avoided if she had taken the time to talk Jamila about how she had determined the correct pay rate.

When preparing to talk to an employee about issues in the workplace, managers should consider the following questions:

- What are you trying to achieve?
- Are you prepared? Do you have all the right information and useful examples?
- When and where are you going to have the conversation? Is it timely? Is it somewhere that you both feel comfortable?
- Are you calm?
- Can you allow the employee to steer the conversation (within reason)?
- Are you prepared to listen and consider all points of view?
- Have you thought about possible resolutions?

During the conversation, remember to:

- refer to any conversations you've already had
- clearly outline the employee's entitlements (if that's what the issue is about)
- include any supporting information, such as relevant information from www.fairwork.gov.au
- stick to facts, rather than opinions, and give specific examples where possible
- invite the employee to share their point of view and listen to what they have to say
- keep an open mind – there might be facts or issues you don't know about
- allow the employee to bring a support person to any meetings
- make a record of any discussions, including the date and time when they occurred.

PRACTICAL TIP: Our Difficult conversations in the workplace – manager course can help you prepare for these discussions with your employee. The course includes practical tips to help you handle the conversation well, deal with the problem and get on with running your business. You can access this and other free online courses from at fairwork.gov.au/learning.

Manage change

Many disputes occur when there has been a change in the workplace. Change can have a significant impact on employees, especially if it was unexpected. It can leave them uncertain or even anxious or afraid about what the change will mean for them, which can lead to misunderstandings and disputes. Good communication and a consultative approach can help to minimise conflict.

Create a strategy to communicate with employees about change. Consider:

- what the changes are – the explanation should put the change into context so employees can understand why it's happening and how it will affect them
- who will communicate with employees – this should be a senior manager, to give the messages authority and credibility
- when the message will be communicated – communicate early and often
- how the message will be communicated – for example email, team meetings, online forums
- what input employees can have in the process.

PRACTICAL TIP: Remember that if the change is significant, there might be specific communication and consultation requirements in your award or enterprise agreement.

Even if you aren't legally required to, consider consulting your employees about changes in your workplace as a matter of routine. Consulting with your employees gives them a stake in the decisions being made.

Best practice employers regularly share information with employees about the performance, goals and challenges of the business. This can help employees to see the whole picture and minimise disputes when change is required.

For more information, see our Consultation and cooperation in the workplace best practice guide available at fairwork.gov.au/bestpracticeguides.

Put things in writing

Having written contracts of employment and clear workplace policies makes entitlements and rules clear for everybody.

This could save you time and money that might otherwise be spent sorting out misunderstandings, resolving disputes or even defending claims in a tribunal or court.

PRACTICAL TIP: Many workplace documents can become out of date over time. To stay on top of this:

- have a process to make sure that contracts of employment and job descriptions are updated (for example, when someone gets a promotion). You could schedule this for the same time as your annual pay or performance review
- review and update your policies. Make sure you consult with employees about any proposed updates.

Train managers and employees on how to resolve disputes

Make sure your managers understand your dispute resolution process.

People will be influenced by their own background, experience and communication skills when resolving disputes. However, you can help managers work at best practice by providing training and coaching on:

- establishing the key facts and issues
- listening
- encouraging open dialogue
- focusing on the employee's specific needs
- guiding a discussion to find ways to resolve the dispute.

You should also tell employees about your dispute resolution process during induction training and other staff communications. Make it clear that if there is a dispute employees are expected to:

- express the issues from their perspective
- be open, honest and respectful in their communications
- listen.

Dispute resolution shouldn't interfere with day-to-day work. While the process is underway, employees should continue to comply with the employer's directions and perform any work that is safe and appropriate.

PRACTICAL TIP: Many workplace documents can become out of date over time. To stay on top of this:

- have a process to make sure that contracts of employment and job descriptions are updated (for example, when someone gets a promotion). You could schedule this for the same time as your annual pay or performance review
- review and update your policies. Make sure you consult with employees about any proposed updates.

Create a simple dispute resolution process

Whatever the size or type of business, the best dispute resolution processes will:

- **Be simple and credible**. It's important your employees know their issues or grievances will be taken seriously.
- **Be sensitive**. Employees want to be reassured their issue will be handled confidentially, and that raising the issue or grievance will not harm their job prospects.
- **Seek clarification**. Enable the facts and issues in dispute to be clarified but also encourage open expression of opinions and recognise the importance of feelings.
- **Encourage listening**. Listening to an employee will draw out what the dispute is really about. It might be due to a simple misunderstanding. It might be about issues that are quite different from the issues initially raised by the employee. Good listening will help managers determine the real issues and work out how they can be best resolved. A good dispute resolution process reassures employees that they are being heard.
- **Set expectations**. Begin with an expectation that the dispute can be resolved between the people concerned, while also recognising that more serious issues may need to be escalated.
- **Establish an escalation process**. Provide a path for escalation if the dispute can't be resolved by discussion with the employee. It won't always be possible to escalate the dispute through senior management. If this is the case and you're unable to resolve the dispute, you could seek third-party assistance to help resolve the matter.
- **Be consistent**. Consistency is a key aspect of a credible dispute resolution process. Employees need to know that the business will approach all disputes with the same organisational values and objectivity and that, wherever possible, disputes will be resolved by the same process.
- **Be quick**. Prompt resolution of disputes is always desirable. It shows that the employer takes dispute resolution seriously. The longer unresolved disputes exist, the greater the chances of ongoing conflict or distractions in the workplace.
- **Be transparent**. Employees must know what the process is, understand the steps and know what the potential outcomes are.

> A good dispute resolution process promotes fairness. If people feel they are fairly treated, then it is more likely that they will be engaged in their work and motivated to contribute.

Proactively manage complaints

Dealing with complaints may seem time consuming and frustrating but knowing about the issues that upset your employees can have significant benefits for your business.

It lets you fix problems before they escalate, and better protect your business from risk. For example, in dealing with a complaint you might identify that a policy isn't as clear as it should be. This gives you an opportunity to fix it and potentially avoid future disputes.

PRACTICAL TIP:

- Have a clearly written and accessible complaints procedure. This procedure could be accompanied by policies which explain what's considered appropriate behaviour in the workplace.
- Create a workplace culture of trust, transparency and open communication. If employees feel safe, they're more likely to tell you what's on their minds.
- Make sure managers and senior people in your business know about the complaints procedure and are trained to handle complaints effectively.
- Set up a simple way for employees to report problems and complaints. Some businesses use a telephone hotline, an email address or a 'complaints and suggestions box' to do this. Others prefer complaints to be made in person to the employee's manager or another senior person in the business.
- Nominate more than one person that employees can address their complaint to. This is important because their manager may be the person being complained about.
- Let your employees know that their complaint will be taken seriously, investigated fairly, resolved promptly and without retaliation of any kind.

Get help with a dispute

If you haven't been able to resolve the issue internally, you may want to ask a third party to assist. The approach you choose will depend on the issue you're trying to resolve.

Industry association

Your industry or business association can provide you with tailored advice and assistance to help you understand your rights and obligations. A list of unions and employer associations formally registered under the national workplace relations system can be found from the Commission at fwc.gov.au/registered-organisations/find-registered-organisation. There might also be other industry and business bodies in your area that can help.

Requesting assistance from the Fair Work Ombudsman

You or your employee may choose to request assistance from the Fair Work Ombudsman.

When someone asks for our help, we review the information provided and decide what action, if any, we will take. Our decisions are guided by our Compliance and Enforcement Policy. For more information go to fairwork.gov.au/compliancepolicy.

If your dispute is about pay or entitlements, we may offer you our no-cost dispute assistance service.

Disputes usually occur because people don't know what the law is, or because communication has broken down. FWO Officers are experts in workplace relations. Their role is to help both parties understand the law, communicate, and make informed choices. This may involve:

- identifying the issues in dispute
- providing advice and information about each party's workplace rights and obligations
- facilitating discussions and exploring ways to resolve the dispute (if possible)
- explaining proposed resolutions, and possible alternatives, so parties can make informed decisions
- providing information about other options to pursue the dispute if it isn't resolved.

For more information visit our Fixing a workplace problem page at fairwork.gov.au/fixing-workplace-problems.

Legal avenues

You or your employee can seek legal advice from a legal representative at any time. They may be able to assist you with a range of actions, including providing advice about your rights and responsibilities to your employees.

To find a solicitor, visit the law institute or law society within your state or territory. To find a community legal centre go to the Australian Community Legal Centres website available at clcs.org.au.

Your employee might choose to take legal action. The small claims process under the Fair Work Act can be used to recover employee entitlements or other debts up to $100,000. In some cases, the court may allow the successful applicant to recover any court filing fees paid from the respondent. The small claims process is quicker, cheaper and more informal than regular court proceedings. The aim is to settle disputes quickly and fairly, with minimum expense to the parties. For information about small claims go to fairwork.gov.au/smallclaims.

Mediation

If you haven't been able to resolve the workplace issue with your employee, an accredited mediator might be able to assist you. Generally, mediation is a voluntary process, so both you and your employee must agree to mediation. Dispute resolution procedures in an enterprise agreement or contract may require the parties to mediate.

Mediators don't take sides, give advice or decide who's right or wrong. They help you work through the issues and reach a solution that everyone can accept.

Some community organisations and private dispute resolution providers offer free or low-cost mediation services. For some matters, the Commission may be able to assist through an informal mediation process. You can find more information about mediation at the Commission at fwc.gov.au.

Conciliation

Conciliation is very common in workplace disputes and is undertaken in most unfair dismissal cases in the Commission. Conciliation is a voluntary process to help an employer and employee resolve an unfair dismissal dispute. The process allows each party to negotiate in an informal setting to identify if there is a solution to the issue.

Conciliation is very similar to mediation except that the conciliator:

- will likely have some specialist workplace relations knowledge
- may give expert advice or information.

You can find out more about the conciliation process through the Commission at fwc.gov.au/conciliation.

Arbitration

Arbitration is a less common way of resolving workplace disputes. What makes arbitration different from other types of dispute resolution is that the parties agree that an independent and impartial person (the arbitrator) will listen to each side and then make a decision that's binding on everyone.

Best practice checklist

A best practice workplace involves more than just understanding and complying with the law.

This checklist will help you work at best practice when managing disputes and complaints within your business:

- ☐ **develop a policy** – develop a dispute resolution policy that suits your business. This will help ensure the dispute resolution process is consistent, fair and works for both the employees and the business
- ☐ **provide training** – make sure employees and managers know about the dispute resolution process and how to use it. This can be done by providing training and awareness sessions
- ☐ **communicate** – talk with your employees. Regular communication is important as it helps to build trust and good working relationships
- ☐ **listen to concerns** – take all concerns seriously. Listen to your employees and show them that you take their concerns seriously. Although some issues might seem minor at first, they could be an indication of a larger problem
- ☐ **regular meetings** – hold regular meetings. These allow you to communicate current issues, workplace rules and changes
- ☐ **be proactive** – proactively deal with any workplace issues. Many workplace conflicts happen because of misunderstandings and can be resolved more easily if discussed at an early stage.

Australian Government

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Where to find more information

Resources

- To learn more about effective dispute resolution
  - visit our Workplace problems page at fairwork.gov.au/workplace-problems.
  - see the Fair Work Commission's Issues we help with page which explains when and how they can assist with dispute resolution in the workplace. Visit fwc.gov.au/issues-we-help.
  - use the Attorney-General's Department's Guide to Dispute Resolution available at ag.gov.au/legal-system/alternative-dispute-resolution.
- You can access our free online training for employers and managers at fairwork.gov.au/learning. Available courses cover best practice approaches to difficult conversations in the workplace, hiring employees, managing employees, managing performance, diversity and discrimination, workplace flexibility and record-keeping and pay slips.
- You can find all our best practice guides at fairwork.gov.au/bestpracticeguides. These easy-to-follow and practical guides will help you transform your business from compliant to best practice, so you can get the most out of your employees.

Links

Fair Work Commission
fwc.gov.au

Enterprise agreement model term for dealing with disputes
See Regulation 6.01 of the Fair Work Regulations 2009 available at fairwork.gov.au/legislation.

CONTACT US

Fair Work online: fairwork.gov.au

Fair Work Infoline: **13 13 94**

Need language help?

Contact the Translating and Interpreting Service (TIS) on **13 14 50**

Help for people who are deaf or have hearing or speech difficulties

You can contact us through the National Relay Service (NRS).

Select your preferred access option and give our phone number: **13 13 94**

The Fair Work Ombudsman is committed to providing you with advice that you can rely on. The information contained in this fact sheet is general in nature. If you are unsure about how it applies to your situation you can call our Infoline on 13 13 94 or speak with a union, industry association or a workplace relations professional.

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